Supreme Court, U.S.
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No. 02 1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ET. AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "accident" condition precedent to air carrier liability for a passenger's death under Article 17 of the Warsaw Convention is satisfied when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the carrier's negligence were a link in the chain of causation? The Ninth Circuit's answer to this question in the affirmative directly conflicts with the Third and Eleventh Circuit decisions in *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), and is contrary to the Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985).

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Ninth Circuit:

1. Petitioner OLYMPIC AIRWAYS.

2. Respondents Rubina Husain, Hannah Husain, Sarah Husain, Isaac Husain and the Estate of Abid M. Hanson, M.D.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner OLYMPIC AIRWAYS is a foreign corporation organized and existing under the laws of the Hellenic Republic of Greece with the majority of its shares owned by the government of Greece. No parent or publicly held company owns 10% or more of the stock of petitioner OLYMPIC AIRWAYS.

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Petitioner OLYMPIC AIRWAYS ("OLYMPIC") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 12, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 316 F.3d 829 (9th Cir. Dec. 12, 2002) and is reproduced in the Appendix hereto at A 1a-21a.[1] The Amended Findings of Fact and Conclusions of Law of the District Court is officially reported at 116 F. Supp. 2d 1121 (N.D. Cal. Oct. 3, 2000) (Breyer, J.) and is reproduced at A 32a-80a. The Supplemental Findings of Fact and Conclusions of Law of the District Court is unofficially reported at 2000 WL 1780264, No. C 99-1400 CRB (N.D. Cal. Nov. 28, 2000) and is reproduced at A 23a-31a.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 2002 and this Petition has been filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Trans-

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[1] References preceded by "A" refer to pages in the Appendix hereto.

portation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix at A 81a-84a.

STATEMENT OF THE CASE

A. The Nature of the Case

This Petition involves the legal question of whether, as a matter of treaty law, a normal condition in the aircraft cabin, which aggravates a passenger's pre-existing medical condition, can meet the "accident" condition precedent to liability under Article 17 of the Warsaw Convention, even if crew negligence was a link in the chain of causation, a consideration that expressly falls under Article 20(1) of the Convention.

Plaintiffs Rubina Husain (individually and as personal representative of the estate of decedent), Hannah Husain, Sarah Husain and Isaac Husain [hereinafter "plaintiffs"] brought an action against OLYMPIC in California Superior Court for Alameda County to recover damages as a result of the death of Abid M. Hanson, M.D. [hereinafter the "decedent" or "Dr. Hanson"] on January 4, 1998 while on board OLYMPIC flight 417 from Athens, Greece to New York. A 3a. Plaintiffs alleged that Dr. Hanson died as a result of an asthma attack caused by exposure to ambient cigarette smoke in the passenger cabin of OLYMPIC flight 417. A 3a.

OLYMPIC timely removed the action to the United States District Court for the Northern District of California on March 23, 1999 under 28 U.S.C. § 1441. A 33a. The jurisdiction of the district court was based upon the Foreign Sovereign Immunities Act (28 U.S.C. § 1330)[2] and federal question (28 U.S.C. § 1331) under the Warsaw Convention, a treaty of the United States. A 33a. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291.

It is undisputed that the liability of OLYMPIC is governed exclusively by the Warsaw Convention, as supplemented by the Montreal Agreement,[3] as decedent's death occurred during the course of "international transportation by air" within the meaning of Article 1 of the Convention. *See* Warsaw Convention, Article 1 (A 81a).[4] Article 17 of the Warsaw Convention creates air carrier liability for passenger injury or death if caused by an "accident" within the meaning of the Convention. *See Air France v. Saks*, 470 U.S. 392, 405-07 (1985). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's liability under Article 17 for a passenger's bodily injury or death to the sum of $75,000, unless the death was proximately caused by the "wilful misconduct" of the air carrier within the meaning of Article 25 of the Convention, in which event the monetary limit on recoverable damages is not available to the carrier.

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[2] OLYMPIC is a "foreign state" within the meaning of the 28 U.S.C. § 1603 of the Foreign Sovereign Immunities Act, as the majority of its shares are owned by the government of Greece. A 33a, n.1.

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966) ("Montreal Agreement"). Pursuant to the Montreal Agreement, air carriers, by special contract, voluntarily agreed to increase the limit of liability to $75,000 and to waive the defense of all necessary measures for passenger injury or death set forth in Article 20(1) (A 83a) of the Convention. *See Saks*, 470 U.S. at 406-07 (1985).

[4] Decedent was traveling pursuant to a ticket that provided for round-trip transportation by air, U.S.—Egypt—U.S.

B. Statement of the Relevant Facts

The following facts are based upon the Findings of Fact of the district court as adopted by the Court of Appeals (A 3a-9a) and are not disputed for purposes of this Petition.

Decedent's Pre-Existing Medical Condition. Decedent, Abid M. Hanson, M.D., was 52 years old at the time of his death. A 3a. For more than 20 years prior to his death, Dr. Hanson suffered from asthma for which he did not receive regular treatment. A 4a. Dr. Hanson also suffered from severe food allergies but the extent of which was unclear. A 4a-5a.

In the two years prior to his death, Dr. Hanson had suffered two medical emergencies that the record shows may have been caused by asthma or food allergies. A 5a. At trial, experts for both parties agreed that at least one of these episodes was likely caused by food-related allergies. A 5a. In light of his existing medical condition, Dr. Hanson carried an emergency kit containing epinephrine in the event of an allergic reaction to food. A 5a. In addition, Dr. Hanson regularly carried and used a Proventil/Albuterol inhaler to aid his breathing. A 4a.

The Trip to Cairo. In December 1997, Dr. Hanson and his family flew from San Francisco to Athens and Cairo for vacation. The trip involved a stop in New York where Dr. Hanson learned that OLYMPIC allowed smoking on international flights. A 5a. Dr. Hanson and his family asked for and were assigned seats in the non-smoking section. A 5a. The flight to Cairo was uneventful. A 6a.

The Incident on the Return Trip to New York. On January 4, 1998, Dr. Hanson began the return trip from Cairo to the United States via Athens. A 6a. Dr. Hanson was seated in the non-smoking section on the flight from

Cairo to Athens and did not experience any breathing problems. A 6a. During a three to four hour layover in Athens, however, Dr. Hanson began having problems breathing. A 6a. The airport waiting area was very smoky and Dr. Hanson used his inhaler. A 6a.

Upon boarding OLYMPIC flight 417 from Athens to New York, Dr. Hanson and his family noticed that Dr. Hanson was seated in non-smoking row 48 and that the smoking section began in row 51.[5] A 6a, n. 3. Ms. Husain, Dr. Hanson's wife, approached OLYMPIC flight attendant Maria Leptourgou, informed her that Dr. Hanson could not be near the smoking section, and asked Ms. Leptourgou to move Dr. Hanson to another non-smoking seat. A 6a. Ms. Leptourgou responded by telling Ms. Husain to "have a seat." A 6a. After all of the passengers were seated, but before take-off, Ms. Husain again approached Ms. Leptourgou and asked that she move Dr. Hanson to a different non-smoking seat, explaining that he was allergic to smoke. A 7a. Ms. Husain testified that Ms. Leptourgou replied that she could not transfer Dr. Hanson to another seat because the plane was "totally full," and that she was too busy at the moment to assist Dr. Hanson. A 7a. Discovery revealed that flight 417 had 11 unoccupied seats: 2 business class; 6 non-smoking economy class; and 3 smoking economy class. A 7a, n. 5.

Shortly after take-off, the passengers in the smoking section began to smoke and Dr. Hanson indicated to his wife that the smoke was bothering him. A 7a. Ms. Husain approached Ms. Leptourgou and told her that she needed to move Dr. Hanson for health reasons. A 7a. Ms. Leptourgou again explained that she could not move Dr.

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[5] The aircraft was a Boeing 747 with 426 seats in 56 rows. In economy class, rows 14-50 were in the non-smoking section and rows 51-56 were in the smoking section. A 6a, n. 3.

Hanson because the "plane is full," but that Ms. Husain could ask other passengers if they would switch seats with Dr. Hanson. A 7a. Ms. Husain then returned to her seat and took no further action. A 40a.

After the meal service, the smoking increased and Dr. Hanson's breathing problems worsened. A 8a. Dr. Hanson walked to the front of the cabin to get some fresh air. A 8a. Upon reaching the front of the cabin, Dr. Hanson asked for his epinephrine kit, which Ms. Husain retrieved and then administered a shot. A 8a. She then went to notify Dr. Umesh Sabharwal, an allergist and family friend who was traveling with Dr. Hanson and his family. A 8a. Dr. Sabharwal helped Dr. Hanson to the floor, administered another shot of epinephrine, then began performing CPR and also administered a shot of Bricanyl. A 8a. Despite the efforts of Dr. Sabharwal and other passengers who assisted, Dr. Hanson died. A 8a. No autopsy was performed to determine the direct cause of death. A 8a.

C. The Findings of Fact and Conclusions of Law of the District Court

Following the denial of OLYMPIC's motion for summary judgment, which argued that Dr. Hanson's death was not caused by an "accident," a precondition to liability under Article 17 of the Warsaw Convention, the case proceeded to trial.[6] At trial, plaintiffs argued that Dr. Hanson died from a severe asthma attack caused by inhaling second-hand smoke. OLYMPIC argued that Dr. Hanson's death was the result of an allergic reaction to food or some other medical problem unrelated to the

[6] The case was tried to the district court in accordance with the Foreign Sovereign Immunities Act, which provides only for non-jury civil actions. 28 U.S.C. §§ 1330(a), 1605. A 33a, n. 1.

smoke and, in any event, was not caused by an Article 17 "accident."

The district court issued its findings of fact and conclusions of law on August 28, 2000, as amended on October 3, 2000.[7] In analyzing the "accident" requirement of Article 17 of the Warsaw Convention, the district court specifically recognized that "the smoke in the cabin was not the 'unusual' or 'unexpected' event which caused Dr. Hanson's death, although . . . the smoke undoubtedly had a significant place in the causal chain." A 51a. In fact, while the district court found that smoke exposure during flight 417 was the primary cause of Dr. Hanson's death, the court held that Ms. Leptourgou's failure to accede to Ms. Husain's requests to reassign Dr. Hanson to another seat on the aircraft was an "accident" under Article 17 of the Warsaw Convention which proximately caused his death. A 59a-60a. The district court also found Dr. Hanson 50% at fault for his own death in that he failed to take any action to change his seat. A 78a. The district court then found Ms. Leptourgou's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention. A 67a.

The district court awarded plaintiffs $1,400,000, but reduced the award by 50% due to Dr. Hanson's comparative negligence. A 79a-80a. On November 28, 2000, the district court issued supplemental findings of fact and conclusions of law awarding plaintiffs an additional $1,400,000 (reduced to $700,000) in non-pecuniary damages. A 31a. Final judgment in the amount $1,400,000 was entered on November 28, 2000. A 22a. OLYMPIC timely appealed.

[7] The Amended Findings of Fact and Conclusions of Law only made technical corrections. All references herein are to the Amended Findings and Conclusions.

D. The Decision of the Court of Appeals Below

The Court of Appeals affirmed the district court's findings and conclusion that Dr. Hanson's death was caused by an Article 17 "accident."

Article 17 Accident. The Court of Appeals below found that the OLYMPIC flight attendant's (Ms. Leptourgou's) failure to move Dr. Hanson to a different non-smoking seat violated OLYMPIC's procedures and was an "accident" under Article 17 of the Warsaw Convention. A 14a. The Court below stated:

> Ms. Leptourgou's failure to act was more egregious in light of the simple nature of Ms. Husain's request, which could easily have been satisfied without interference with the airplane's normal operation. Combined, these factors bring Ms. Leptourgou's failure to assist Dr. Hanson within the meaning of an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation. The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.

A 14a.

Article 17 Causation. Although the Court below first recognized that for "a carrier to be liable for an injury, the passenger must prove the accident caused the injury," the Court held that the "accident need not be the sole cause of the injury," and that it is sufficient if it is any " 'link in the chain.' " A 16a. The Court then found

that "the exposure to smoke and failure to move Dr. Hanson is such a link." A 16a-17a.

Article 25 Wilful Misconduct. The Court of Appeals also affirmed the district court's finding that the death of Dr. Hanson was proximately caused by the wilful misconduct of OLYMPIC. The Court stated: "Ms. Leptourgou's failure to take action, either by moving Dr. Hanson or by notifying the chief cabin attendant of Ms. Husain's request to have her husband moved, was willful misconduct." A 19a.

REASONS FOR GRANTING THE WRIT

Article 17 of the Convention sets forth the conditions precedent to holding an air carrier liable for the death of a passenger. Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the *accident which caused the damage* so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added). Thus, carrier liability only arises if an "accident" caused the passenger injury or death.

Although the meaning of the term "accident" was addressed by the Court in *Air France v. Saks*, 470 U.S. 392 (1985), which involved an action against the carrier by a passenger who suffered an ear injury caused by normal cabin pressurization changes during landing, the lower courts are in conflict as to the proper application of Article 17 and the Court's rulings in *Saks*. In *Saks*, the Court defined an "accident" as "an unexpected or unusual event or happening that is external to the pas-

senger." *Id.* at 405. The Court made clear that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. For this reason, although the "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," issues of crew negligence are not implicated or relevant because the "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407 (emphasis in original).

The courts before and after *Saks* that have properly applied the definition adopted in *Saks* have concluded that if the cause of a passenger's injury was due to the passenger's own internal reaction to the normal flight there is no "accident," even if the carrier's negligence aggravated the passenger's pre-existing condition or was a link in the chain of causation.[8] The decision of the

[8] *See Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521-22 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998); *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *see also Hipolito v. Northwest Airlines, Inc.*, 2001 WL 861984, at *2-3 (4th Cir. July 31, 2001) (affirming summary judgment dismissing action because passenger's death on board an aircraft was not an Article 17 "accident," even where there was allegation of crew negligence); *Rajcoorar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000) (finding inadequate medical care does not constitute an "accident"); *Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111, 114 (S.D.N.Y. 1991) (stating that parties agreed that no "accident" occurred when airline crew aggravated pre-existing condition of passenger); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996) (finding that airline crew's failure to respond with adequate medical assistance to passenger suffering a heart attack did not constitute an "accident"); *Fischer v. Northwest Airlines*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985) (finding that no "accident" occurred when defendants failed to immediately transport passenger to hospital).

Court below, however, necessarily rejects these cases in its misapplication of the Warsaw Convention and *Saks*, and creates a conflict with the Court of Appeals for the Third and Eleventh Circuits.

I

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE THIRD AND ELEVENTH CIRCUITS BECAUSE IT ALLOWS RECOVERY FOR AN INJURY CAUSED BY A PASSENGER'S INTERNAL REACTION TO NORMAL FLIGHT CONDITIONS

The decision of the Court below is wrong and in direct conflict with the decisions of the Court of Appeals for the Third and Eleventh Circuits, which hold that when an injury or death "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," there can be no Article 17 "accident," even if the carrier's negligence aggravated the passenger's pre-existing medical condition or was a link in the chain of causation.

1. The Third Circuit Abramson Decision

In *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), a leading pre-*Saks*[9] case with facts very similar to this case, the issue was whether the alleged airline's aggravation of a pre-existing injury during the course of a

[9] The *Abramson* case applied the same standard adopted by *Saks* and was cited by the Court in *Saks* as an example of the category of cases where "routine travel procedures . . . produce an injury due to the peculiar internal condition of a passenger," which the Court found does not fit within the definition of "accident" for purposes of the Convention. *See Saks*, 470 U.S. at 405.

normal flight is an Article 17 "accident." *The Third Circuit answered no.*

Plaintiff in *Abramson* suffered an attack from a pre-existing paraesophageal hiatal hernia while traveling from Anchorage to Tokyo on Japan Airlines ("JAL"). 739 F.2d at 131. When *plaintiff's wife* asked the flight attendant for a place where plaintiff could lie down and employ a self-help remedy, the stewardess responded that there were no empty seats and plaintiff was required to remain in his assigned seat. *Id.* Discovery, however, revealed that there were nine empty seats in first class. *Id.* Plaintiff brought an action against JAL, claiming that JAL's "refusal to aid him" aggravated his injury which was an "unusual and unexpected happening" and, thus, an Article 17 "accident." *Id.* at 132. Applying its "unusual or unexpected happening" test, the Court of Appeals rejected the passenger's arguments and found that JAL's alleged "acts and omissions" did not constitute an "accident":

> In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an "accident" within the meaning of Article 17.

Id. at 133.

Thus, "the occurrence that allegedly aggravated plaintiff's condition was not an 'accident' within the terms of Article 17 of the Warsaw Convention." *Id.* at 135.

2. *The Eleventh Circuit Krys Decision*

Similarly, in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), the issue was whether the alleged aggravation of a pre-existing condition due to crew negligence during

the course of a normal flight is an Article 17 "accident." *The Eleventh Circuit answered no.*

In *Krys*, a passenger who suffered a heart attack during a transatlantic flight brought an action against the air carrier claiming that the crew's failure to properly respond to his heart attack symptoms (*i.e.*, make an emergency landing rather than continuing to its destination), aggravated the damage to his heart. 119 F.3d at 1517. The air carrier argued that aggravation of a pre-existing condition due to crew negligence is an "accident" (thereby limiting the carrier's liability to $75,000). *Id.* at 1519.[10] The Eleventh Circuit rejected the airline's argument and found that there was no Article 17 "accident." The Court found that the only correct approach to analyzing the "accident" requirement is to look "at the factual events, as opposed to an assertion of 'crew' negligence. . . ." *Id.* at 1521-22. Unlike the Court below, the Eleventh Circuit recognized that this is the only approach which is consistent with the structure of the Convention and the Court's decision in *Saks*. *Id.* The Court explained:

> if we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson*, the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event"—instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same

[10] *Krys* was decided prior to the Court's exclusivity decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) and the issue of exclusivity had not been preserved for appeal by the air carrier. *Krys*, 119 F.3d at 1518, n.8.

token, ***if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, [footnote omitted] then it seems clear that the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."***

119 F.3d at 1521 (emphasis added and citations omitted).

3. The Ninth Circuit Decision Below

Looking to the purely factual description of relevant events, the aggravating event is Dr. Hanson remaining in his assigned non-smoking seat and being exposed to ambient smoke, which allegedly aggravated his pre-existing condition leading to his death. As in *Abramson* and *Krys*, the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."

The Court below professed that its decision was factually distinguishable from *Krys* and *Abramson*.[11] A plain reading of the facts and the holdings of each case, however, evince that they are not genuinely distinguishable:

- **As here**, *Abramson* and *Krys* involved a passenger with a pre-existing medical condition:

[11] The Court below found that in *Krys* the crew was not aware of a need for immediate action, and in *Abramson*, the crew was not aware that the passenger had an urgent medical condition nor were there several requests to move him (although the need for immediate action was surely assumed as the passenger's wife, like Dr. Husain's wife, requested a different seat assignment because of her husband's medical condition). A 13a-14a.

Abramson—a pre-existing hernia condition

Krys—a pre-existing heart condition

This case—a pre-existing asthmatic condition

- **As here**, *Abramson* and *Krys* involved an injury caused by the passenger being subjected to the normal conditions of the flight, which resulted in injury:

  Abramson—remaining in his economy class seat unable to lie down

  Krys—continuation of the flight to its scheduled destination

  This case—remaining in his non-smoking seat exposed to ambient smoke

- **As here**, *Abramson* and *Krys* involved allegations of crew negligence that was an alleged link in the chain of causation:

  Abramson—failure to provide the passenger with additional seats

  Krys—failure to make an emergency landing/misdiagnosis

  This case—failure to move Dr. Hanson to another non-smoking seat

- **Unlike here**, *Abramson* and *Krys* found no Article 17 "accident."

Accordingly, under the Third and Eleventh Circuit's interpretation of Article 17 and the Eleventh Circuit's interpretation of *Saks*, Dr. Hanson's death would not be considered to have been caused by an "accident."[12]

[12] The Fourth Circuit's interpretation of Article 17 in the unreported decision of *Hipolito*, 2001 WL 861984, at *2-3, is consistent

Under the Ninth Circuit's interpretation of Article 17 and *Saks*, it is. The conflict is clear, the conflict is direct and the conflict is irreconcilable. Certiorari should be granted to resolve this conflict and provide guidance to the lower courts as to what is an Article 17 "accident."

II

THE COURT BELOW HAS CREATED A NEW DEFINITION OF "ACCIDENT" THAT IS NOT RECONCILABLE WITH THE COURT'S DECISION IN *SAKS*, THE STRUCTURE OF THE CONVENTION AND *KRYS*

The Court below incorrectly shifted the focus of the "accident" requirement from an inquiry into the nature of the event which caused the injury (*i.e.*, the smoke), to the care taken by the airline to avert the injury (*i.e.*, a flight attendant's failure to move Dr. Hanson to another non-smoking seat), thereby creating a new "accident" standard as follows:

> The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long *as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.*

A 14a (emphasis added).

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with the Third and Eleventh Circuits and, thus, also is in conflict with the Ninth Circuit. In *Hipolito*, the Fourth Circuit affirmed summary judgment dismissing the action because the passenger's asthma-related death was not an Article 17 "accident," even though there was an allegation of crew negligence. *Id.*

Saks, however, should have made clear to the Court below that the focus of the "accident" inquiry is into the nature of the event which caused the injury, and not the care taken by the airline to avert the injury. 470 U.S. at 407. The "accident" standard developed by the Court below misconstrues the nature of the liability created by the Warsaw Convention by improperly focusing the "accident" inquiry on reasonableness, foreseeability and the carrier's mental state—neither the Convention nor *Saks* makes the "accident" inquiry contingent upon the perception of a risk, "reasonable alternatives" or whether these alternatives "would not unreasonably interfere with the normal, expected operation of the aircraft."

The new "accident" standard created by the Court below ignores *Saks* and injects into Article 17 the concepts of the "absence of negligence" (Article 20(1)) and "wilful misconduct" (Article 25). The Court should provide guidance to the lower courts that this treaty does not permit the courts to relieve the passenger from meeting the condition precedent to establishing a right of recovery under Article 17 through an analysis of the negligence of a carrier's employee.

One of the primary goals of the Warsaw Convention was to limit the liability of air carriers. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169-70 (1999); *Eastern Airlines v. Floyd*, 499 U.S. 530, 546 (1991). As explained by the Court in *Tseng*, 525 U.S. at 170, the Warsaw Convention balances the interest of the passenger seeking to recover damages for injuries and the interest of the carrier to limit its liability.[13] The Con-

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[13] Before the Warsaw Convention was adopted, carriers in civil law countries were permitted to contractually disclaim liability for passenger injury or death. The drafting history of the Convention reflects the drafters' compromise with respect to passengers, between no liability and exposure to unlimited liability. *See Second Interna-*

vention was drafted as a compromise between those interests. *Id.*

The preliminary draft of what eventually became Article 17 [then draft Article 22] made the air carrier liable "in the case of death, wounding, or other bodily injury *suffered* by a traveler." *Saks*, 470 U.S. at 401 (emphasis added). The early Article 17 draft also contained language that permitted the air carrier to avoid liability by proving all reasonable measures were taken to avoid the damage. *Id.* The drafting committee changed the liability provisions, expressly narrowing the liability of the air carrier to encompass only an injury "caused" by an "accident." *Id.* at 402-03; *see Tseng*, 525 U.S. at 173. In addition, the all reasonable measures defense was removed from the liability provision and placed into a separate article [Article 20(1)].[14] Thus, the "accident" requirement of Article 17 is distinct from the due care defense of Article 20(1), a distinction overlooked by the Court below. *See Saks*, 470 U.S. at 407; *Krys*, 119 F.3d at 1522. This drafting history, together with the goals of the Convention, demonstrates that the initial "accident" inquiry is not to be resolved by reference to foreseeability, alternatives or the degree of the carrier's culpability, which were relegated to Article 20(1) and Article 25, respectively. *See Saks*, 470 U.S. at 407; *Carey v. United Airlines*, 255 F.3d 1044, 1048 (9th Cir. 2001)

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tional Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw Convention Minutes at 47-48 (R. Horner & D. Legrez transl. 1975).

[14] Article 20(1) provides an exception to the presumptive liability under Article 17 if the air carrier establishes that it took all necessary measures to avoid the passenger's injury or that it was impossible to take such measures. *Saks*, 470 U.S. at 406-07. Pursuant to the terms of the Montreal Agreement, this defense has been waived for international flights that originate, terminate, or have stopping points in the United States.

(definition of "accident" makes "no mention of the carrier's motive or mental state whatsoever"). The Court in *Saks* clearly stated:

> The "accident" requirement of Article 17 . . . involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury.

470 U.S. at 407 (emphasis in original).

As explained by the Eleventh Circuit in *Krys*:

> we think that looking at the factual events, as opposed to an assertion of "crew negligence," is in accord with the design of the Warsaw Convention, which provides carriers a "due care" defense. [Footnote omitted] Having provided for a defense turning on the absence of negligence, we think it is unlikely that the drafters intended that the initial "accident" inquiry be resolved by reference to negligence. [Citation omitted].

119 F.3d at 1522-23. Indeed, the fact that crew negligence is irrelevant to the Article 17 "accident" inquiry is confirmed by the ultimate holding in *Krys*, which after finding that there was no "accident," determined that the air carrier's conduct was negligent and upheld liability under state law. *Id.* at 1528.

The focus of the Court below on "crew negligence" (*i.e.*, the failure of the flight attendant to act in light of what the Court considered to be the reasonable alternatives), conflicts with structure of the Convention, the meaning of Article 17 and its interpretation as applied in *Saks*, and as followed by the Eleventh Circuit in *Krys*.

III

THE QUESTION PRESENTED IS IMPORTANT AS THE LOWER COURTS ARE MISAPPLYING ARTICLE 17 AND *SAKS* TO CIRCUMVENT THE RESULT MANDATED BY *TSENG*

The proper interpretation of the "accident" condition precedent to liability is of particular importance as there is an increasing amount of health-related passenger litigation (*e.g.*, heart attacks, deep vein thrombosis (DVT)) and the issue arises in each action whether such passengers are entitled to recovery if an air carrier fails to provide them with special accommodations even though the injury is due to a pre-existing medical condition that is aggravated by exposure to the normal and expected conditions on the aircraft.

In *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), the Court addressed the question of the exclusivity of the Warsaw Convention and held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or dismembarking,' if not allowed under the Convention, is not available at all." *Id.* at 161 (citation omitted).

Prior to *Tseng*, the majority of lower courts viewed that an aggravation of a passenger's pre-existing medical condition was not an Article 17 "accident," even if there were allegations of crew negligence. *See supra* note 8. While *Tseng* did not implicate the meaning of the term "accident," courts, such as the district court below,[15] have redefined "accident" for the sole purpose of cir-

[15] The district court below rejected *Krys* and *Abramson* based in part upon its concern for a dissolution of the carrier's duty of care and perception of a "sudden sea change" as to the meaning of an "accident" after *Tseng*. A 58a.

cumventing the clear holding of *Tseng*. These post-*Tseng* cases find that pre-*Tseng* accident cases are not instructive and hold that an aggravation of a passenger's pre-existing medical condition can be an Article 17 "accident" because, to hold otherwise, would deprive the passenger of a potential remedy under state law. *See Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1084 (N.D. Ill. 2002) (holding that the carrier's failure to assist an ailing passenger from a pre-existing medical condition may be an "accident;" pre-*Tseng* "accident" cases are not instructive because the Warsaw Convention is now plaintiff's exclusive remedy); *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 573 (S.D. Tex. 2001) (holding that reliance upon *Abramson* and *Krys*, pre-*Tseng* decisions, was misplaced and that a carrier's failure to respond to an injury suffered onboard an aircraft may be an "accident"); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 666 (S.D.N.Y. 2001) (finding pre-*Tseng* holdings in *Abramson* and *Krys* may have been affected by the non-exclusivity of the Convention and are not controlling).

There is no basis in law for such a misapplication of the term "accident." In *Saks* and *Tseng*, the passenger was left without a right of recovery and the treaty language has not changed to deviate from this result. Simply because a passenger's exclusive remedy is provided by the Warsaw Convention does not change the Article 17 "accident" analysis, nor does it render pre-*Tseng* decisions meaningless. The Court in *Tseng* specifically made clear: "Postratification adjustments . . . are appropriately made by the treaty signatories," not the courts. 525 U.S. at 673 n.12; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996) ("it is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence."); *Floyd*, 499 U.S. at 546

(Convention must be interpreted to give effect to drafters' concern of protecting the carrier rather than providing full recovery to injured passenger); *Carey*, 255 F.3d at 1053 ("To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention."). As noted by Judge Wallace in his prescient dissent in *Saks*, which rejected similar reasoning by that Panel's majority decision:

> the majority's reading of the Convention "is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers," a theory alien to the Convention's language, even accounting for the private Montreal Agreement. Recovery for damages under article 17 of the Convention requires more than travel or an occurrence: it requires an accident. Normal cabin depressurization is no accident.

Saks v. Air France, 724 F.2d 1383, 1390 (9th Cir. 1984) (Wallace, J., dissenting) (citations omitted), *rev'd*, 470 U.S. 392 (1985).

The Court should grant certiorari to provide definitive guidance to the lower courts as to the proper interpretation of Article 17, the Court's decision in *Tseng* and to ensure a consistent and correct application of the Warsaw Convention.

CONCLUSION

Based upon the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 12, 2003

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-14509

Argued and Submitted February 12, 2002

Filed December 12, 2002

RUBINA HUSAIN, individually and as personal representative of the estate of; Abid M. Hanson, M.D.; Hannah Husain; Sarah Husain; Isaac Husain, by and through their Guardian ad Litem, Rubina Husain,

Plaintiffs-Appellees,

—v.—

OLYMPIC AIRWAYS,

Defendant-Appellant.

SUSIE INJIJIAN, Sterns and Walker, Oakland, CA, *for the plaintiff-appellee*.

ANDREW J. HARAKAS, Condon and Forsyth, New York, NY, *for the defendant-appellant*.

Appeal from the United States District Court
for the Northern District of California;
Charles R. Breyer, District Judge, Presiding.
D.C. No. CV-99-01400-CRB.

Before

REINHARDT and FISHER, *Circuit Judges*,
and MOLLOY, *District Judge*.*

OPINION

MOLLOY, *District Judge*:

I. Introduction

After a non-jury trial, the district court determined that Dr. Abid M. Hanson's death on Olympic Airways ("Olympic") Flight 417 was caused by an accident as defined by Article 17 of the Warsaw Convention. The trial judge also found the accident resulted from willful misconduct by Olympic's employees. The district court awarded $1,400,000 in damages. Olympic appeals the determinations of the district court and the award of damages. We hold that the district court's findings are not clearly erroneous and we AFFIRM.

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* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

II. Factual and Procedural Background

A. Overview

On January 4, 1998, 52 year-old Dr. Abid M. Hanson died while a passenger on Olympic Flight 417 between Athens, Greece and New York City. His death occurred after he suffered complications when he was exposed to ambient second-hand smoke while seated in the airplane's non-smoking section three rows in front of the smoking section. The plane had clearly demarcated sections for seating, one for smokers and one for non-smokers, though no partition separated the two. Dr. Hanson's wife, Rubina Husain, had asked Olympic's employees on multiple occasions with increasing urgency to move Dr. Hanson to another seat away from the smoking section. She explained the critical reasons Dr. Hanson had to move and made her concerns known about the consequences of leaving him exposed to the offensive smoke. Ms. Husain's requests were ignored, primarily by flight attendant Maria Leptourgou. Dr. Hanson died from a severe asthma attack caused by the smoke exposure.

Plaintiffs filed suit in California Superior Court for Alameda County on December 24, 1998. Olympic removed the action to the United States District Court for the Northern District of California on March 23, 1999. On February 25, 2000, Olympic moved for summary judgment claiming Dr. Hanson's death was not caused by an accident as defined by Article 17 of the Warsaw Convention.[1] The district court denied the motion for summary judgment without a written opinion

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[1] The full name of the Warsaw Convention is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following *49 U.S.C. § 40105* [hereinafter Warsaw Convention].

on March 24, 2000. A three-day bench trial was held May 30 through June 1, 2000. After the parties presented evidence, the district court asked for post-trial briefs and agreed to hear closing arguments on July 20, 2000. Findings of fact and conclusions of law were entered on August 8, 2000 finding Ms. Leptourgou's failure to move Dr. Hanson to a new seat was an accident under Article 17 of the Warsaw Convention and proximately caused his death. The trial judge found Ms. Leptourgou's refusal to help Dr. Hanson constituted willful misconduct under Article 25 of the Warsaw Convention.

The district court awarded Plaintiffs $1,400,000, but reduced the award by 50% due to Dr. Hanson's comparative negligence. On October 2, 2000, the district court issued amended findings of fact and conclusions of law. Supplemental findings of fact and conclusions of law were issued on November 28, 2000 awarding Plaintiffs an additional $700,000 in non-pecuniary damages. Final judgment was entered on November 28, 2000. Olympic timely appealed.

B. Facts as Determined by the District Court[2]

For more than 20 years before his death on January 4, 1998, Dr. Hanson had been sensitive to secondhand smoke and tried to avoid smoke-filled areas. He suffered from asthma for which he did not receive regular treatment. However, he regularly carried and used a Proventil/Albuterol inhaler to aid his breathing. The frequency of Dr. Hanson's use of the inhaler increased as he aged.

Dr. Hanson was also allergic to many foods, including grapes, yeast and tomatoes. The extent of his allergies is

[2] *See Husain v. Olympic Airways, 116 F.Supp.2d 1121 (N.D.Cal.2000).*

unclear; however, Dr. Hanson often ate tomato-based foods without suffering a reaction.

Before his death, Dr. Hanson had suffered two medical emergencies that may have been caused by asthma or food allergies. In December 1996, Dr. Hanson and his wife were at a smoky restaurant in Las Vegas, Nevada for approximately ten minutes. Before returning to their hotel room, Dr. Hanson and his wife shared a piece of quiche and some cheese pizza. Shortly after returning to the hotel room, Dr. Hanson began having breathing difficulties, to the extent that Ms. Husain called paramedics and had to perform CPR. The paramedics gave Dr. Hanson a shot of epinepherine and transported him to the hospital where he remained overnight.

The cause of the Las Vegas attack is unclear. However, at trial, experts for both parties agreed that the episode was likely caused by food-related allergies. Following the Las Vegas attack, Dr. Hanson began carrying an emergency kit containing epinepherine.

During the summer of 1997, Dr. Hanson suffered another attack after dining at the home of friends in California. After he returned from a post-dinner walk, Ms. Husain noticed Dr. Hanson was having a difficult time breathing and called paramedics. The paramedics gave Dr. Hanson oxygen and observed him for a short period of time. Dr. Hanson was not taken to the hospital, nor was any epinepherine administered. The cause of the breathing difficulties is unknown.

In December 1997, Dr. Hanson, Ms. Husain and their family flew from San Francisco to Athens and Cairo for vacation. The trip involved a stop in New York. Dr. Hanson learned for the first time at the airport in New York that Olympic allowed smoking on international flights. Dr. Hanson and his family asked to be seated in the non-smoking section and their request was honored. On the

flights to Athens and Cairo, the family was seated in non-smoking seats away from the smoking section and were not exposed to ambient smoke. Dr. Hanson did not suffer from breathing problems during the trip.

On January 4, 1998, Dr. Hanson and his family began the return trip from Cairo to the United States via Athens. The family arrived at the Cairo airport early to ensure they obtained non-smoking seats. Ms. Husain showed the check-in agent a letter from Dr. Hanson's brother, who was also a doctor, indicating that Dr. Hanson had asthma. The family was seated in the non-smoking section on the flight from Cairo to Athens and Dr. Hanson did not experience any breathing problems.

During a three to four hour layover in Athens, Dr. Hanson began having problems breathing. The waiting area was very smoky and Dr. Hanson was forced to use his inhaler. An attempt to move to the slightly less smoky first-class lounge was thwarted by airport officials.

Upon boarding Olympic Airways Flight 417 from Athens to New York, Dr. Hanson and his family discovered that they were seated in non-smoking seats, but only three rows ahead of the smoking section which was not partitioned off.[3] Immediately after finding their seats, Ms. Husain approached flight attendant Maria Leptourgou, informed her that Dr. Hanson could not be near the smoking section, and asked Ms. Leptourgou to move him. Ms. Leptourgou responded by telling Ms. Husain to "have a seat."[4]

[3] The airplane was a Boeing 747 with 426 seats in 56 rows. Rows one through 13 were business class seats, while rows 14 through 56 were economy class. In economy class, rows 14 through 50 were non-smoking seats and the seats in rows 51 through 56 were in the smoking section. Dr. Hanson was seated in row 48, seat E.

[4] Ms. Leptourgou was not available for the trial and had not been deposed. The district court noted that its factual findings regarding Ms. Leptourgou were based primarily on Ms. Husain's testimony, which the district judge found "quite credible." *Husain, 116 F.Supp.2d at 1125 n. 2.* The district court also noted that Ms. Husain's testimony was corroborated by the testimony of the Sabharwals, friends of Dr. Hanson and his family who accompanied them on the trip, and Issac and Sarah Husain, and "much of the uncontradicted evidence." *Id.*

After all of the passengers were seated, but before take-off, Ms. Husain once again approached Ms. Leptourgou and adamantly asked that she move Dr. Hanson to another seat, explaining that he was allergic to smoke. Ms. Leptourgou refused, stating that she was "too busy" and the flight was "totally full." *Husain, 116 F.Supp.2d at 1125.*

Immediately after take-off, passengers in the smoking section were allowed to begin smoking. From that point forward, people in the smoking section were smoking continuously, including people seated in rows 51 through 56 and people in other rows who moved back to the smoking section to smoke and socialize. The smoke began to envelope Dr. Hanson and his family. After Dr. Hanson indicated that the smoke was bothering him, Ms. Husain approached Ms. Leptourgou and, for the third time on the airplane, told her that she needed to move Dr. Hanson for health reasons. Ms. Leptourgou again refused stating that the plane was full. She did tell Ms. Husain that she and Dr. Hanson could ask other passengers to switch seats, but they would not be assisted by the flight crew. Despite one last plea for help by Ms. Husain, Ms. Leptourgou refused to help Dr. Hanson find another seat.[5]

[5] Despite Leptougou's statements otherwise, Flight 417 was not full. The flight had 11 unoccupied seats, two of which were in business class. The flight was also carrying 28 non-revenue passengers, including employees and relatives of employees of Olympic and other airlines, 17 of whom were seated in business class or in the non-smoking section. *Husain, 116 F.Supp.2d at 1126.*

The amount of smoke floating around row 48 only increased as the flight progressed, especially after a meal was served. While Dr. Hanson ordered a meal, he did not eat much, and shared his meal with his daughter and another passenger. After the meal, Dr. Hanson's breathing problems worsened. He had emptied one inhaler and asked Ms. Husain to get another one. After telling his daughter that the smoke was bothering him, he walked to the front of the cabin to get some fresh air.

Ms. Husain followed Dr. Hanson to an area between rows 19 and 20 where he had stopped and was leaning against a chair. The doctor asked for his epinepherine kit, which Ms. Husain retrieved and then administered a shot. She then went to notify Dr. Umesh Sabharwal, an allergist and family friend who was traveling with Dr. Hanson and his family.

Dr. Sabharwal helped Dr. Hanson to the floor, administered another shot of epinepherine, and then began performing CPR. Dr. Hanson's pulse was barely detectable and his lower airway was obstructed, though the upper airway was not. Dr. Sabharwal continued to perform CPR and also administered a shot of Bricanyl. Dr. Hanson was also given oxygen during this time.[6] Despite the efforts of Dr. Sabharwal and other passengers who assisted, Dr. Hanson died.

Because of religious reasons, there was no autopsy to determine the direct cause of death. In the district court and here, Plaintiffs argued that Dr. Hanson died from a severe asthma attack caused by inhaling secondhand

[6] The district court found the testimony regarding who supplied and administered the oxygen was "entirely contradictory." *Husain, 116 F.Supp.2d at 1127 n. 7.* Some witnesses testified that the oxygen was supplied from a canister and mask belonging to Olympic, while others testified the oxygen came from a canister and mask from Dr. Hanson's emergency kit.

smoke. Defendants believe that Dr. Hanson's death was the result of an allergic reaction to food or some other medical problem unrelated to the smoke. The district court determined that the smoke exposure during Flight 417 was the primary cause of Dr. Hanson's death. We abide by and defer to those findings.

Of major significance to the district court was the timing of the events. First, Dr. Hanson was complaining about the secondhand smoke before the meal was served. Second, while Dr. Hanson had some food allergies and he did eat some food on the flight, there was no evidence that he ate any foods to which he was allergic. Third, experts for both parties and Dr. Sabharwal testified that smoke was a contributing factor, though the degree to which it contributed was disputed. Nonetheless, it is for the district court to resolve the factual disputes and to draw inferences from the proof.

III. Analysis

A. Standard of Review

A district court's findings of fact are reviewed for clear error. *Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th Cir.2001).* Clear error review is deferential to the district court, requiring a "definite and firm conviction that a mistake has been made." *See Easley v. Cromartie, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001).* Thus, if the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is convinced it would have found differently. *United States v. Working, 224 F.3d 1093, 1102 (9th Cir.2000)* (en banc).

A district court's conclusions of law are reviewed de novo. *Freeman, 253 F.3d at 536.* However, if the application of the law to the facts requires an inquiry that is

"essentially factual," review is for clear error. *Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205, 1210 (9th Cir.1997)*. A district court's determination of proximate cause is reviewed for clear error. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency, 216 F.3d 764, 783 (9th Cir.2000), aff'd, 535 U.S. 302, 122 S.Ct. 1465 (2002)*. Likewise, a district court's finding of "willful misconduct" under Article 25 of the Warsaw Convention is reviewed for clear error. *Koirala, 126 F.3d at 1210*.

B. Dr. Hanson's Death Was Proximately Caused by an "Accident" Under Article 17 of the Warsaw Convention

(1) Article 17 "accident"

Liability for harm to international air travelers is established by Article 17 of the Warsaw Convention. Article 17 provides, in its entirety:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, art. 17. For a carrier to be liable to an injured passenger, the passenger must prove an accident caused the injury. *Air France v. Saks, 470 U.S. 392, 396, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985)*. As defined by the Supreme Court, an accident is "an unexpected or unusual event or happening that is external to the passenger." *Id. at 405, 105 S.Ct. 1338*.

When determining whether an accident has occurred, the definition of accident "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* Where there is contradictory evidence, "it is for the trier of fact to decide whether an 'accident'. . . caused the passenger's injury." *Id.* If the passenger's injury "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," it is not the result of an accident as envisioned under Article 17. *Id. at 406, 105 S.Ct. 1338*.

The district court found Ms. Leptourgou's refusal to move Dr. Hanson to another seat, despite three increasingly desperate requests by Ms. Husain, was an accident under Article 17. It did so because Ms. Leptourgou (1) violated the recognized standard of care for flight attendants on international flights by refusing to assist; (2) violated Olympic's policy; and (3) failed to alert the chief cabin attendant or another flight attendant to help Dr. Hanson find another seat. The district court found that Ms. Husain specifically told Olympic workers, including Ms. Leptourgou, that Dr. Hanson was "susceptible to smoke," "allergic to smoke," and "could not be in any smoke." Despite these warnings, Ms. Leptourgou refused to assist Dr. Hanson. Considering the warnings and knowledge of the doctor's medical problems, Ms. Leptourgou's actions constituted an unusual or unexpected event. Ultimately, the district court concluded that Ms. Leptourgou's actions created a foreseeable risk of injury and therefore constituted an accident under Article 17.

Olympic argues Dr. Hanson's death resulted from "internal reactions to the usual, normal, and expected operation of the aircraft" and therefore cannot have resulted from an accident. A predicate of the argument is

that the presence of ambient smoke in the cabin is "an expected and normal aspect of international air travel." Consequently, Olympic argues it had no duty to move Dr. Hanson. Olympic further contends that Dr. Hanson's pre-existing allergies, not his exposure to ambient secondhand smoke, led to his death.

Plaintiffs in essence contend that a flight attendant who does nothing to deal with a known risk to a passenger's health-related travel problems is negligent. Because Ms. Leptourgou's conduct was negligent, it fits the definition of accident under Article 17. Plaintiffs argue that crew negligence is external to the passenger and is not a reasonably expected part of international travel.

In *Abramson v. Japan Airlines Co.*, plaintiff Stanley Abramson suffered from a pre-existing paraesophagel hiatal hernia for which he had been undergoing treatment for six years. *739 F.2d 130, 131 (3d Cir.1984).* Abramson had been hospitalized for the condition in June 1981 and had been informed that he should have elective surgery to alleviate the condition. *Id.*

In August 1982, Abramson's condition began to bother him while on a Japan Airlines flight. *Id.* Abramson had not informed Japan Airlines of his condition. When Abramson's wife asked that he be able to lie down across multiple seats to apply a self-help remedy to relieve the pain, a flight attendant told her there were no empty seats. *Id.* It was later determined through discovery in the case that nine first class seats were open. *Id.*

Abramson alleged that the flight attendant's refusal to allow him to lie down caused his condition to worsen, ultimately leading to his hospitalization. The district court entered summary judgment in favor of Japan Airlines finding that Abramson's injuries were not the result

of an accident. *Id.* The Third Circuit affirmed the district court, finding that an aggravation of an existing injury during a routine flight, absent "proof of abnormal external factors," was not an unusual or unexpected event. *Id. at 133.*

In *Krys v. Lufthansa German Airlines,* plaintiff Leonard Krys began feeling ill during the first few hours of a ten-hour Lufthansa German Airlines ("Lufthansa") flight between Miami, Florida and Frankfurt, Germany. *119 F.3d 1515, 1517 (11th Cir.1997).* A doctor on board was summoned by flight attendants to tend to Krys. The crew did not make an unscheduled landing, instead relying on the doctor's opinion that Krys was okay. While the plane was flying over Amsterdam, the doctor determined that Krys had likely had a heart attack. After landing in Germany, Krys was taken to a hospital where doctors confirmed that he had suffered a heart attack. *Id.*

Krys filed suit alleging that the crew acted negligently when it failed to properly respond to his symptoms, and that those negligent acts aggravated his injuries. *Id.* The Eleventh Circuit affirmed a district court judgment in Krys' favor, finding that the plane continuing to its intended destination—the "aggravating event" leading to Krys' injury—was not an unexpected or unusual event and therefore not an accident under Article 17. *Id. at 1521-22.* Ironically, the airline—in an effort to invoke the Warsaw Convention's liability limit—was urging the Eleventh Circuit to find that Krys' injuries were the result of an accident, while Krys argued that his heart attack was *not* caused by "an unexpected or unusual event external to the passenger." *Id. at 1518-20.*

The situations in *Krys* and *Abramson* are factually different from Dr. Hanson's case. In *Krys,* Lufthansa employees relied upon the advice of a doctor who had been summoned from among the passengers and made

the initial, albeit erroneous, determination that Krys had not suffered a heart attack. Thus, Lufthansa was not aware that there was a need for immediate action. Likewise, in *Abramson*, defendant Japan Airlines was not informed that Abramson had a medical condition that required such action. Nothing in Abramson's case indicates that he made multiple requests or informed the crew of the urgency of the situation. By contrast, Ms. Husain repeatedly informed Ms. Leptourgou and other Olympic personnel that Dr. Hanson could not be exposed to smoke for health reasons, and that it was necessary that he be moved immediately. Despite her knowledge of Dr. Hanson's health risk, Ms. Leptourgou failed to act.

The district court found, after examining evidence establishing industry standards and Olympic's policies regarding passengers with medical needs, that this failure to act was a "blatant disregard of industry standards and airline policies." *Husain, 116 F.Supp.2d at 1134.* Ms. Leptourgou's failure to act was more egregious in light of the simple nature of Ms. Husain's request, which could easily have been satisfied without interference with the airplane's normal operation. Combined, these factors bring Ms. Leptourgou's failure to assist Dr. Hanson within the meaning of an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation. The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.

Because the district court's conclusion that Ms. Leptourgou's failure to help Dr. Hanson constituted an unexpected or unusual event is inextricably intertwined with the facts in this case, it is reviewed for clear error. *See Koirala, 126 F.3d at 1210.* Based on the record before the district court, we cannot conclude that it clearly erred.

(2) Accident as proximate cause of Dr. Hanson's death

For a carrier to be liable to a passenger for an injury, the passenger must prove the accident caused the injury. *Saks, 470 U.S. at 396, 105 S.Ct. 1338.* "Any injury is the product of a chain of causes" and the passenger need only prove "some link in the chain was an unusual or unexpected event external to the passenger." *Id. at 406, 105 S.Ct. 1338.*

Olympic argues that Dr. Hanson's death resulted from his pre-existing food allergies, noting that the meal served on Flight 417 included numerous food items to which Dr. Hanson was allergic. Pointing to past incidents where Dr. Hanson suffered medical problems ostensibly after eating foods to which he was allergic, Olympic further asserts the exact cause of Dr. Hanson's death is unknown because food-related anaphylaxis cannot be ruled out and there was no evidence presented to show asthma caused his death. Finally, Olympic asserts there was no evidence Dr. Hanson would have lived had Olympic found him a different seat.

Plaintiffs counter that the evidence showed secondhand smoke around Dr. Hanson's seat was heavy, especially after mealtime, and that there was no evidence showing anaphylaxis caused Dr. Hanson's death. Plaintiffs also assert that secondhand smoke need not be the sole cause of Dr. Hanson's death, as long as it is a cause.

In its findings of fact, the district court rejected the assertion that Dr. Hanson died as a result of food-related anaphylaxis. Rather, the district court found Dr. Hanson's died as a result of exposure to secondhand smoke. The district court stated:

> The Court cannot credit defendant's suggestion that Dr. Hanson's breathing problems prior to the meal were causally unrelated to his later asphyxiation. The evidence before the Court suggests exactly the opposite conclusion. Dr. Hanson explicitly complained that smoke was affecting his breathing just hours before his death, complained to his wife about the level of cigarette smoke on the plane, and relied extensively on his inhaler for support during the hours leading to his fatal attack. To conclude, as defendant urges, that the smoke on Flight 417 did not trigger Dr. Hanson's death is to ignore the chain of events leading up to his attack.

Husain, 116 F.Supp.2d at 1128-29. Further, the district court considered Dr. Hanson's previous reactions to food and the food served on the plane, yet found Dr. Hanson was suffering breathing difficulties before the meal on the airplane was served and that there was not any testimony that Dr. Hanson ate any of the foods he was allergic to while on Flight 417.

As discussed above, it is apparent that the failure to move Dr. Hanson caused exposure to the smoke that led to his death. There was testimony at trial that the smoke around Dr. Hanson was particularly thick. Olympic personnel were aware of Dr. Hanson's condition, yet they did nothing to assist him. Under *Saks,* the accident need not be the sole cause of the injury, but it must-be a "link in the chain." *470 U.S. at 406, 105 S.Ct. 1338.* In this case, the exposure to smoke and failure to move Dr.

Hanson is such a link. The facts as determined by the district court, and confirmed by the record, establish that seats were available and that Ms. Leptourgou's failure to help Dr. Hanson resulted in continued exposure to second hand smoke. The district court concluded that had Ms. Leptourgou heeded Ms. Husain's requests for help, Dr. Hanson would not have been exposed to second hand smoke and would not have died. In other words, the minimization of the risk of smoke exposure would have prevented the physiological response that caused his death.

Whether Dr. Hanson's death was caused by a reaction to second hand smoke resulting from Ms. Leptourgou's failure to assist or by a reaction to food allergies may appear to be a close call. However, the district court, as the trier of fact, was in the best position to determine which of two plausible explanations was correct. The district court's determination here is plausible in light of the record before the district court, thus is not clearly erroneous, and will not be disturbed on appeal.

C. Dr. Hanson's Death Was Proximately Caused by Olympic's "Willful Misconduct" Under Article 25 of the Warsaw Convention

Carrier liability for injuries caused by an accident is usually limited to $75,000 per passenger. However, Article 25 provides that injuries that result from the carrier's willful misconduct or the willful misconduct of an employee acting within the scope of her employment are excluded from the liability limits[7].Warsaw Convention,

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[7] Montreal Protocol No. 4 later amended the Warsaw Convention's "willful misconduct" standard to one of "intentionally or recklessly with knowledge that damage would probably result." The United States Senate ratified the Protocol in November 1998 and it went into force in the United States on March 4, 1999. *Carey v.*

art. 25. Article 25 does not create a separate cause of action and therefore a plaintiff must establish both an accident and willful misconduct to be able to recover above the $75,000 limit. *McDowell v. Cont'l Airlines, 54 F.Supp.2d 1313, 1321 (S.D.Fla.1999).*

Willful misconduct has been defined as "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage or the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences."[8] *Koirala, 126 F.3d at 1209* (quoting *Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir.1987)*). At a minimum, a plaintiff must prove the carrier "must have known" of the risk to prove willful misconduct. *Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1291 (11th Cir.1999).* Determining willful misconduct is based on a subjective standard and can be satisfied through circumstantial evidence. *Koirala, 126 F.3d at 1211.*

United Airlines, 255 F.3d 1044, 1047 n. 11 (9th Cir.2001) (citations and internal quotations omitted).

[8] This Court has also analyzed Article 25's "willful misconduct" standard under California law. *See Dazo v. Globe Sec. Servs., 295 F.3d 934, 940-41 (9th Cir.2002)* (cargo case). Under California law, willful misconduct is distinguishable from negligence:

> Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, willful misconduct is not marked by a mere absence of care. Rather, it involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences.

Id. at 941 (citing Calvillo-Silva v. Home Grocery, 19 Cal.4th 714, 80 Cal.Rptr.2d 506, 968 P.2d 65, 76 (1998) (citations and internal quotations omitted)). Ms. Leptourgou's failure to act constituted willful misconduct under either of these standards.

In *Koirala,* a plane crashed into a mountain after the crew flew in the wrong direction for six minutes while attempting to land in Kathmandu. *Id. at 1208.* Thai Airways argued that the evidence showed the crew was stressed because of poor weather and difficult landing conditions and that the evidence did not show the crew consciously failed to look at their instruments. *Id. at 1210.* This Court found the district court did not clearly err in finding willful misconduct given the crew's failure to realize the plane was flying in the wrong direction for six minutes. *Id.* In reaching its conclusion, this Court paid particular attention to expert testimony offered by the plaintiffs to establish the standard of care. *Id. at 1211.*

Like the crew in *Koirala,* Ms. Leptourgou's failure to take action, either by moving Dr. Hanson or by notifying the chief cabin attendant of Ms. Husain's request to have her husband moved, was willful misconduct. The district court concluded "Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury." *Husain, 116 F.Supp.2d at 1139.* This conclusion is supported by the record in this case, including the highly credible testimony of Ms. Husain. Additionally, because Ms. Leptourgou did not testify in person or by deposition, Ms. Husain's version of events was uncontradicted.

Of equal import was testimony by Plaintiffs' expert that Ms. Leptourgou was aware of the industry standard of care and Olympic policy regarding passengers requesting seat transfers for medical reasons. This established that Ms. Leptourgou should have assisted Dr. Hanson in finding a new seat, especially since there were available seats further away from the smoking section.

Ms. Leptourgou's duty to act was compounded by the urgency of Ms. Husain's requests.

Olympic argues that Plaintiffs did not show Ms. Leptourgou engaged in misconduct or that she was subjectively aware of the risk of harm to Dr. Hanson. In Olympic's view, all of the seats in Ms. Leptourgou's section were full so she was not aware the flight was not totally full, and she was not aware of the risk of harm to Dr. Hanson because he did not ask to be moved, nor did he or Ms. Husain seek a different seat when Ms. Leptourgou told them they could. Even so, she still did not advise the crew chief of the problem.

However, as the district court determined, Ms. Husain "was not merely a typical passenger complaining about an inconvenient seat assignment," because her repeated requests became increasingly "emphatic and desperate." *Id.* Based on Ms. Husain's testimony, the district court found Ms. Leptourgou could not have "failed to recognize that Dr. Hanson's problem was a medical one and that sitting near the smoking section was likely to cause him injury." *Id.* Despite this, Ms. Leptourgou "deliberately closed her eyes to the probable consequences of her acts." *Id.*

The district court, as the trier of fact in this matter, was in a superior position to appraise and weigh the evidence, and its determination regarding the credibility of witnesses is entitled to special deference. *See Anderson v. City of Bessemer, 470 U.S. 564, 573-75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Allen v. Iranon, 283 F.3d 1070, 1078 n. 8 (9th Cir.2002).* The district court's decision was based on the testimony of Ms. Husain, Plaintiffs' expert, and Olympic's own employees, and is well-grounded in the record. While establishment of willful misconduct requires a party to satisfy a high burden, the evidence before the district court in this case is

sufficient to meet that burden. The facts in the record establish that Ms. Leptourgou was aware that Dr. Hanson was in a desperate situation that required immediate assistance, yet despite this knowledge and increasingly emphatic pleas from Ms. Husain, Ms. Leptourgou ignored Olympic's policy and industry standards and refused to assist Dr. Hanson. This amounts to a dereliction of duty that is not only unusual and unexpected on an international flight, but willful.

The district court's conclusion that Ms. Leptourgou's actions were willful misconduct cannot be disturbed on review unless we are left with a "definite and firm conviction that a mistake has been made." *Sec. Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1014 (9th Cir.1997).* Based on facts in the record and the exhaustive findings by the district court, we cannot conclude that a mistake has been made.

IV. Conclusion

We decide that the district court's findings and conclusions are well-grounded in the record. Olympic's argument asks this Court to substitute its judgment and second guess the district court. This we cannot do. Olympic failed to meet its burden of showing that the district court's findings are clearly erroneous and that the district court erred in its application of the law. Therefore, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-1400 CRB

RUBINA HUSAIN, individually and as personal representative of the estate of ABID M. HANSON, M.D.; HANNAH HUSAIN; SARAH HUSAIN and ISAAC HUSAIN, minors, by and through their Guardian ad Litem, RUBINA HUSAIN,

Plaintiffs,

—v.—

OLYMPICA AIRWAYS,

Defendant.

JUDGMENT

Pursuant to the Court's Amended Findings of Fact and Conclusions of Law dated October 2, 2000 and its Supplemental Findings of Fact and Conclusions of Law dated November 28, 2000, it is hereby ordered that Judgment be entered in favor of the plaintiffs and against the defendant in the amount of $1,400,000.00.

IT IS SO ORDERED.

Dated: November 28, 2000

CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 99-1400 CRB

November 28, 2000

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D.; Hannah Husain; Sarah Husain and Isaac Husain, minors, by and through their Guardian ad Litem, Rubina Husain,

Plaintiffs,

—v.—

OLYMPIC AIRWAYS,

Defendant.

SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

BREYER, J.

Now before the Court is the plaintiffs' motion for modification and/or clarification of this Court's Findings of Fact and Conclusions of Law issued on August 28, 2000 ("Findings"). The plaintiffs filed their motion on September 5, 2000. On October 2, 2000, the Court issued an Amended Findings of Fact and Conclusions of Law ("Amended Findings"), which was nearly identical

to the Findings with the exception of several minor technical corrections involving the numbering of section headings. Thus, the Court will treat the plaintiffs' motion as a motion to modify and/or clarify the Amended Findings. After seeking guidance from the parties regarding several factual and legal issues, the Court now issues the following Supplemental Findings of Fact and Conclusions of Law in response to the plaintiffs' motion.

BACKGROUND

The Court need not repeat the extensive facts outlined in its Amended Findings, but a brief review of the case is helpful. This suit arose from the death of Dr. Abid M. Hanson on an international passenger flight in January 1998. Dr. Hanson suffered from asthma, and he died after inhaling a significant amount of second-hand smoke. He was accompanied on the flight by his then 41-year-old wife Rubina Husain and their three children Hannah, Sarah, and Isaac, then aged 10, 17, and 19, respectively.

After a bench trial on May 30-June 1, 2000, the Court issued its Findings on August 28, 2000, and the Amended Findings on October 2, 2000. The Court found that Olympic Airways was liable under the Warsaw Convention since Dr. Hanson's death was an "accident" as defined by the Convention. It also held that the defendant's liability was not limited to $75,000 since the defendant had engaged in willful misconduct. In addition, the Court determined that Dr. Hanson was comparatively liable for his own death at a rate of fifty percent.

The Court then observed that the evidence supported "an award of damages commensurate with the pecuniary loss to Dr. Hanson's surviving family." Amended Findings at 36. However, it noted that "[t]he parties have not

established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case." *Id.* After calculating the pecuniary loss to the plaintiffs at $1,400,000, the Court discounted that figure by fifty percent to account for Dr. Hanson's comparative fault and awarded the plaintiffs damages in the amount of $700,000 for Dr. Hanson's wrongful death.

DISCUSSION

The plaintiffs brought their motion seeking clarification of this Court's statement that "[t]he parties have not established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case." The plaintiffs argue that California law governs the damages this Court may award, and that California law permits a court to award non-pecuniary damages. Moreover, they assert that the evidence they presented at trial supports an award for the non-economic losses suffered by the Husains.

I. CHOICE OF LAW

The plaintiffs are correct that California law governs this suit. The parties agree that Dr. Hanson died while the Olympic Airways plane was flying over Germany, so the Death on the High Seas Act does not apply. Accordingly, the Court must instead resort to California choice-of-law rules. *See Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1002 (9th Cir.1987)* (noting that the Warsaw Convention does not specify which party's internal law is the proper law, but that the problem "is easily resolved in the routine Warsaw Convention case, in which a federal court has diversity jurisdiction"); *id.* ("For many years it has been the rule that a federal court sitting in

diversity applies the conflict-of-law rules of the state in which it sits.").

Under California's choice-of-law rules, "California will decline to apply its own law to a case brought in California only if it is shown that another state has a greater interest in having its law applied." *In re Aircrash in Bali, Indonesia on Apr. 22, 1974, 684 F.2d 1301, 1307 (9th Cir.1982)* (observing that "California has adopted the 'governmental interest' approach to questions of conflicts of laws" and citing *Hurtado v. Superior Court, 11 Cal .3d 574 (1974)*). If the parties do not suggest any other state that would have a greater interest in having its law applied, then a district court sitting in California properly employs California law in resolving the dispute. *See In re Aircrash, 684 F.2d at 1307* (applying California law to an action involving an airplane crash under the Warsaw Convention).

Here, California has a greater interest than any other state in applying its law to protect and compensate Californians who are the victims of conduct leading to wrongful deaths. These parties never raised a choice of law issue, and they agreed throughout the litigation—and again when this Court asked them for guidance after issuing its Amended Findings—that California substantive law governs the dispute. Thus, the Court will apply California law regarding the recovery of non-economic losses in a wrongful death action.

Under California damages law, non-pecuniary losses may be awarded. Survivors in a wrongful death claim are entitled to both economic and non-economic losses. *See* BAJI No. 14.50 (8th ed.1994) (instructing that a jury may award "economic and non-economic" damages); *Krouse v. Graham, 19 Cal.3d 59, 67 (1977)* (establishing that a plaintiff may recover for non-pecuniary damages in an action for wrongful death); *id.* (noting that "for the

past century California courts have uniformly allowed wrongful death recovery for loss of the society, comfort, care and protection afforded by the decedent").

The defendant does not dispute that California law applies to this suit, nor does it contend that California law forbids recovery for non-pecuniary losses. Instead, the defendant asserts that the Court's statement that the parties had not established that damages in excess of the plaintiffs' pecuniary loss were legally appropriate meant that the Court had concluded that non-economic damages were not warranted, or at least that its damage award included both pecuniary and non-pecuniary losses.

The defendant's interpretation of the Amended Findings is in error. This Court did not mean to imply that the plaintiffs had not suffered non-economic losses, or that its award incorporated both pecuniary and non-pecuniary damages. Instead, the Court meant simply what it said: that the parties had not at that time established the legal framework under which this Court could determine whether an award of non-economic loss was appropriate. By agreeing that Dr. Hanson died over Germany and that therefore California substantive law applies (as opposed to the Death on the High Seas Act), the parties have now established the proper legal basis on which this Court may decide whether and to what extent to award damages for the plaintiffs' non-pecuniary loss.

II. THE AWARD OF NON-ECONOMIC DAMAGES

California's model jury instructions direct a jury to award "reasonable compensation for the loss of love, companionship, comfort, affection, society, solace or moral support, any loss of the enjoyment of sexual relations, and any loss of the physical assistance to a spouse in the operation or maintenance of the home." *See* BAJI

No. 14.50 (unnecessary brackets omitted). Moreover, the instructions indicate that the fact-finder is not to consider any pain or suffering of the decedent, any grief or sorrow of the heirs, or the poverty or wealth of any heir. *See id.* The Court must diminish any recovery in proportion to Dr. Hanson's comparative negligence. *See id.* (Use Note (citing 6 Witkin, Summary of Calif. Law (9th ed.), Torts, § 1214).

In responding to this Court's request for guidance regarding an appropriate amount for non-economic damages, the parties have (perhaps not surprisingly) produced quite disparate figures. The defendant asserts that Isaac and Sarah Husain will be financially independent in the near future and did not suffer "any exceptional non-economic loss." Defendant's Letter Brief, Nov. 17, 2000, at 1. The defendant also contends that the evidence in the record does not support an award of non-economic damages to Hannah Husain. *See id.* The defendant cites a single case, *Huey v. Carteron,* 1997 WL 465515 (T.D. Cal.Jury), in which a 45-year-old businessman was survived by his 48-year-old widow and his two sons, aged 18 and 17. In *Huey,* which involved a medical malpractice claim, the jury awarded only $64,000 in special damages. As a result, the defendant contends, the plaintiffs are entitled to non-economic damages in the range of $75,000 to $100,000.

The plaintiffs argue that this Court's non-economic award should be several times its award for economic damages. In addition to outlining in great detail the evidence indicating that the plaintiffs suffered non-economic losses, the plaintiffs have also cited studies regarding the importance of paternal involvement in a child's development. *See* Plaintiffs' Letter Brief, Nov. 21, 2000, at 2-5 (citing portions of the trial transcript to demonstrate the plaintiffs' non-economic losses); *id.* at

4 (citing studies regarding a father's role in a child's life). The plaintiffs have also identified cases in which the awards for non-economic losses ranged from $3,750,000 to $7,500,000. *See id.* at 9 (citing six cases). The plaintiffs assert that awards for non-economic damages are typically several times the corresponding awards for economic damages because "non-economic loss is far more devastating to surviving family members because it is a loss that can never be replaced." *Id.* at 5. In the plaintiffs' view, $4,000,000 to $6,000,000 is a more appropriate figure to compensate the plaintiffs.

The plaintiffs did present evidence regarding the non-economic loss they suffered as a result of Dr. Hanson's death. Rubina Husain, married to Dr. Hanson for twenty years at the time of his death, described in her testimony the activities the family used to do together for recreation. *See* Transcript of Bench Trial ("Transcript"), Vol. 1 (May 30, 2000), at 69-70 (testimony of Rubina Husain). She also indicated that Dr. Hanson was active around the house and helped her with chores such as gardening and cleaning. *See id.* at 73. Isaac Husain testified that Dr. Hanson "was a very caring father and a very loving father." Transcript at 142 (testimony of Isaac Husain) (observing that one of Dr. Hanson's "principal avocations and pleasures in life is [sic] his role as a father"). Isaac Husain also recounted the interest that Dr. Hanson took in the Husain children's lives, and the time they all spent together talking, taking trips, and attending athletic events. *See id.* According to Isaac Husain, Dr. Hanson and Rubina Husain had a very close relationship and worked together in raising the three Husain children. *See id.* at 142-43. Finally, in her testimony, Sarah Husain depicted a typical day in her family's life and commented on the importance of her father to the family. *See* Transcript, Vol. II (May 31, 2000), at 336-337 (testi-

mony of Sarah Husain). She also discussed the chores that her father performed around the house, his attendance at the children's activities, the assistance he provided to her in applying for college, and the closeness of his relationship with the Husain children. *See id.* at 337-43.

It is, of course, difficult to attach a specific monetary figure to the value of a father to his wife and three children. In addition to the parties' letter briefs, this Court also performed its own review of verdicts from other wrongful death cases in California for guidance. Many cases awarded well over one million dollars in non-economic damages for the surviving spouse and minor children of a decedent. *See, e.g., Hoskins v. Vintage Petroleum Inc.*, 1998 WL 1108100 (T.D. Cal. Jury) (awarding after a bench trial $2 million in non-economic damages for the wife and two minor children of a decedent killed by toxic gases); *Thomas v. L.A.P.D.*, 1995 WL 766087 (T.D. Cal.Jury) (awarding $1.5 million in non-economic damages for the wife and two minor children of a shooting victim); *Passoff v. Robinson Helicopter Co.*, 1994 WL 846769 (T.D. Cal.Jury) (awarding $3 million in non-economic damages for the wife and two minor children of a decedent killed in a helicopter crash).

A few cases awarded less than one million dollars for non-economic damages to a surviving spouse and minor children. *See, e.g., Balanay v. Knoll,* 1999 WL 504676 (T.D. Cal.Jury) (awarding $250,000 in non-economic damages to the husband and three children of a decedent); *Thompson v. Asbestos Corp. Ltd.*, 1998 WL 389414 (T.D. Cal. Jury) (awarding between $400,000 and $800,000 in non-economic damages to the surviving spouses and children of asbestos victims).

After analyzing all of these verdicts and carefully considering the importance of Dr. Hanson to his family, the Court has concluded that the plaintiffs should receive an award of non-economic damages equal to this Court's earlier award for economic damages. Dr. Hanson was actively involved in his children's lives and provided comfort, support, and physical assistance to his wife, but he enjoyed less-than-perfect health. The plaintiffs are undoubtedly entitled to more than the $100,000 suggested by the defendant, and awarding non-economic damages equal to the family's economic damages seems reasonable and fair.

As a result, the Court concludes that the plaintiffs are entitled to non-economic damages of $1,400,000. The Court then must reduce that figure by fifty percent to account for Dr. Hanson's contributory negligence, for a total additional award of $700,000. Thus, the Court's total award, including its earlier award for the plaintiffs' pecuniary loss, is $1,400,000.

CONCLUSION

For the foregoing reasons, the Court supplements its earlier Amended Findings by awarding the plaintiffs an additional $700,000 in non-pecuniary damages.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 99-1400 CRB

October 3, 2000

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D.; Hannah Husain; Sarah Husain and Isaac Husain, minors, by and through their Guardian ad Litem, Rubina Husain,

Plaintiffs,

—v.—

OLYMPIC AIRWAYS,

Defendant.

GERALD C. STERNS, Sterns & Walker, Oakland, CA, *for Plaintiffs*.

STEPHEN J. FEARON JR., ROBERT J. SAVILLE, Condon & Forsyth LLP, Los Angeles, CA, JOHN MAGGIO, Condon & Forsyth, New York City, *for Defendant*.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

BREYER, *District Judge*.

On an international passenger flight in January 1998, Dr. Abid M. Hanson, a non-smoker who suffered from asthma, inhaled a significant amount of second-hand smoke and died in the company of his wife and three children. Dr. Hanson was not seated in the "smoking" section of the airplane on which he died, but in a seat three rows ahead. Considerable ambient smoke was present at this location. Had Olympic Airways' flight crew responded appropriately to the repeated requests to move Dr. Hanson from this area, he might be alive today.

Plaintiffs Rubina, Hannah, Sarah and Isaac Husain bring this wrongful death action under the liability provisions of the Warsaw Convention. The parties agree that the Warsaw Convention presents plaintiffs' exclusive remedy. Therefore, to determine liability in this case, the Court must decide whether plaintiffs' claim satisfies the requirements of that treaty. Specifically, the Court must decide: (1) whether an "accident" occurred aboard Olympic Airways Flight 417 on January 4, 1998; (2) whether that accident caused the death of Abid Hanson; (3) whether the crew's in-flight actions constituted "willful misconduct"; and (4) to what extent, if any, Dr. Hanson's own negligence contributed to his death.

Plaintiffs filed this suit in state court on December 24, 1998, and defendant removed the case to this Court on March 23, 1999. The Court heard testimony and received evidence in this case on May 30, May 31, and June 1, 2000.[1] After receiving the parties' post-trial briefs, the

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[1] The Court's subject matter jurisdiction over Olympic Airways derives from the Foreign Sovereign Immunities Act, which provides only for non-jury civil actions. *28 U.S.C.A. § 1330(a), 1605.*

Court heard final arguments on July 20, 2000. Supplemental letter briefs were submitted shortly thereafter. This memorandum and order shall constitute the Court's findings of fact and conclusions of law in this matter.

FACTUAL BACKGROUND

I. Dr. Hanson's Medical History

Dr. Abid Hanson was 52 years old in January 1998. For more than two decades prior to his death, Dr. Hanson suffered from asthma. Although Dr. Hanson did not receive regular treatment for his condition, he carried a Proventil/Albuterol inhaler on his person most of the time to assist his breathing. According to the testimony of Dr. Hanson's wife, Ms. Rubina Husain, Dr. Hanson used his inhaler more and more frequently as he aged. Perhaps as a result of his asthmatic condition, Dr. Hanson was particularly sensitive to second-hand cigarette smoke, and he generally tried to avoid smoke-filled areas. Prior to January 4, 1998, Dr. Hanson had never been affected by cigarette smoke during domestic or international air travel.

In addition to his asthma, Dr. Hanson suffered from multiple food allergies. The evidence is somewhat unclear regarding the extent of Dr. Hanson's allergies, or even the particular foods to which he was allergic. A blood test prior to his death indicated that Dr. Hanson was allergic to grapes, yeast and tomatoes. However, Dr. Hanson frequently ate tomato-based dishes at home without incident.

In the two years preceding Dr. Hanson's death, he suffered two notable medical emergencies of unknown origin. In each instance, the incident may have been precipitated by Dr. Hanson's asthma or by an allergic reaction to certain foods. The most serious incident

occurred during a family vacation in Las Vegas in December 1996. One evening, Dr. Hanson and his wife spent approximately ten minutes in a smoky restaurant, shared some cheese pizza and a piece of quiche, and returned to their hotel room. Shortly thereafter, Dr. Hanson began to have trouble breathing. As his breathing difficulties worsened, Dr. Hanson began to turn blue. Ms. Husain performed CPR until the paramedics arrived, at which point Dr. Hanson was administered a shot of epinepherine, a form of adrenaline. After resuscitating Dr. Hanson, the paramedics moved him to the hospital, where he was held overnight. The next morning, Dr. Hanson checked himself out of the hospital against medical advice.

The precise cause of Dr. Hanson's near-fatal experience in Las Vegas is not entirely clear. Although the dry Nevada air or the smoke of the restaurant may have triggered the attack, it was more likely caused by a reaction to certain foods. After reviewing Dr. Hanson's medical records, Dr. Stephen Wasserman, defendant's expert witness, described Dr. Hanson's troubles in Las Vegas as anaphylaxis caused by a severe allergic reaction to food. Plaintiffs' expert, Dr. Jeffrey Golden, agreed, characterizing the episode as "bona fide food-related anaphylaxis."

After the incident in Las Vegas, Dr. Hanson purchased an emergency carrying case containing epinepherine to treat any future attacks. Shortly thereafter, Dr. Hanson experienced a second medical crisis in the summer of 1997, at the home of a friend in Alameda, California. On the evening in question, Dr. Hanson had eaten dinner and then taken a walk outside. Upon Dr. Hanson's return, Ms. Husain noticed that he was having trouble breathing. Fearing that her husband was suffering an asthma attack, Ms. Husain called the paramedics. When they arrived,

the paramedics administered oxygen and observed Dr. Hanson for about ten minutes, but did not take him to the hospital. No epinepherine was administered on that occasion.

The cause of Dr. Hanson's breathing problems in Alameda are unknown. Although defendant posits that this second incident was food-related, there is no evidence to support that hypothesis. Equally likely is that the cold dry air which Dr. Hanson breathed during his walk triggered an asthmatic reaction. In either case, the incident in Alameda reveals little about the cause of Dr. Hanson's death aboard Flight 417 six months later.

II. Dr. Hanson's Death

In late 1997, Dr. Hanson, his wife, Rubina Husain, and their three children ("the Husains") traveled from San Francisco to Athens and Cairo for a family vacation. They were accompanied on their trip by family friends, Dr. Umesh Sabharwal, his wife and their children.

Prior to arriving at the airport, the Husains were unaware that Olympic Airways ("Olympic") permitted passengers to smoke cigarettes on international flights. Upon learning for the first time at the New York airport that their flight would include a smoking section, the Husains requested non-smoking seats. On the 12-hour flight from New York to Athens, the Husains were seated toward the middle or front of the aircraft. On the connecting flight to Cairo, the Husains were again seated away from the smoking section of the cabin. No ambient smoke was present at either location. Dr. Hanson experienced no problems breathing on either flight.

The Husain family spent 12 days in Egypt, and embarked on their return trip to the United States on January 4, 1998. According to the testimony of Ms. Husain, the family arrived at the airport early on the day of the

return flight because they wanted to ensure that they would be seated in the non-smoking section. After receiving the family's seat assignments, Ms. Husain returned briefly to the counter and showed the check-in agent a letter signed by Dr. Hanson's brother, also a medical doctor, explaining that Dr. Hanson had a history of asthma. After showing the letter to the agent, Ms. Husain asked the agent to ensure that the family would be seated in the non-smoking section of the plane.

The first leg of the family's return trip was uneventful, but Dr. Hanson began to experience some breathing trouble during a layover in the Athens airport. The layover in Athens lasted approximately three to four hours, and the large room in which the family was seated was filled with cigarette smoke. During the delay, Dr. Hanson used his inhaler more frequently than usual. Because he was bothered by the pervasive smoke, Dr. Hanson attempted to move into the restricted but slightly less smoky area of the first class lounge, but airport officials asked that he move back to the main room.

After the delay, the Husains and the Sabharwals boarded Olympic Airways Flight 417. It was at this time that the Husains first realized that they had been assigned seats at the rear of the airplane cabin, only a few rows in front of the smoking section. The airplane, a Boeing 747, contained a total of 426 passenger seats in 56 rows. Rows one through 13 were designated as business class seats, and rows 14 through 56 were designated as economy class seats. In the economy class, rows 14 through 50 were designated as non-smoking seats. The economy class smoking section began at row 51 and extended to the rear of the cabin. The Husains were seated in row 48 in seats A through E. The Sabharwals were seated nearby. Dr. Husain was seated in seat 48E, just three rows in front of the smoking section. No

partition separated the smoking from the non-smoking section.

When the Husains arrived at their seats, Ms. Husain noticed Maria Leptourgou, an Olympic flight attendant, circulating in the cabin and advising passengers to sit down for takeoff.[2] Ms. Husain approached Ms. Leptourgou and told her that her husband could not sit in a smoking area. Ms. Husain said to Ms. Leptourgou, "You have to move him." The flight attendant paid little attention to Ms. Husain's request, telling her to "have a seat."

Once the plane was fully boarded, but prior to takeoff, Ms. Husain again approached Ms. Leptourgou and asked the flight attendant to move her husband now that all the passengers on the plane were seated. This time Ms. Husain explained that her husband was "allergic to smoke." At trial, Ms. Husain described her pre-takeoff requests to the flight attendant as "adamant." Ms. Leptourgou replied that she could not transfer Dr. Hanson to another seat because the plane was "totally full." The flight attendant also told Ms. Husain that she was too busy at the moment to assist the Husains.[3]

The Husains remained in their assigned seats during takeoff, and the first several minutes of the flight passed

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[2] Because Ms. Leptourgou was unavailable to testify at trial and was not deposed for the purpose of this case, the Court never heard her recollection of the events leading up to Dr. Hanson's death. In making its factual findings the conversations between Ms. Husain and the flight attendant, the Court must rely primarily on the testimony of Ms. Husain. The Court finds Ms. Husain's testimony to be quite credible, and notes that her recollection of the events on Flight 417 was largely corroborated by the testimony of Dr. Sabharwal and her children, Isaac and Sarah Husain, as well as much of the uncontradicted evidence.

[3] Defendant objects to Ms. Husain's testimony regarding this conversation, arguing that the statements attributed to Ms. Leptourgou are inadmissible hearsay. The Court permitted the testimony at

without incident. Shortly after takeoff, however, the captain turned off the "no smoking" signs, and passengers in the rows behind the Husains began to light cigarettes. From this point on, according to the testimony of Sarah Husain, passengers in rows 51 through 56 were smoking continuously. In addition to those seated in rows 51 through 56, a number of passengers from other rows stood temporarily in the aisles behind the Husains, smoking and socializing. As a result, smoke was both pervasive and constant.

As soon as the smoking began, the Husains were surrounded by ambient smoke which had floated forward into their row. When the smoke began to linger in row 48, Dr. Hanson gestured to his wife and complained that the smoke was "like a chimney." Ms. Husain then stood up and contacted Ms. Leptourgou for a third time. This time, Ms. Husain told the flight attendant, "You have to move my husband from here." Again, Ms. Leptourgou curtly refused, stating that the plane was full. Ms. Leptourgou indicated to Ms. Husain that Dr. Hanson could switch seats with another passenger, but that, in order to do so, Ms. Husain would have to walk through the cabin and ask other passengers herself. She could not enlist the assistance of the flight crew in changing her husband's seat. Ms. Husain, becoming more desperate

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trial, subject to later consideration of the hearsay question. After due consideration, the Court overrules defendant's objection. Ms. Leptourgou's statements were not offered for their truth, and are therefore not hearsay. *See Fed.R.Evid. 801*. Indeed, plaintiff charges, and the Court finds, that Ms. Leptourgou's statements were in fact untrue. The statements establish not that Flight 417 was full or that the crew was unable to move Dr. Hanson, but that Ms. Leptourgou failed to respond appropriately to Ms. Husain's concerns and entreaties. Moreover, even if the statements were admitted only for their truth, they would still likely be admissible as vicarious admissions of a party-opponent. *See Fed.R.Evid. 801(d)(2)*.

and more adamant, told the flight attendant that her husband *had* to move, even if the only available seat were in the cockpit or the first class area of the cabin. The flight attendant, however, was equally resolute. She offered no assistance. Finally, Ms. Husain seeing no hope for accommodation, returned to her seat.

Unbeknownst to the Husains, Flight 417 was actually not full. In fact, the flight contained eleven empty passenger seats.[4] The cabin had a capacity of 426 seats, 44 of which were located in business class and 382 of which were located in economy class. Four of these seats, located in a row immediately behind the smoking section, were designated as "crew rest" seats. Only 411 passengers traveled on Flight 417 on January 4. Therefore, the flight had eleven unoccupied seats, not including those designated for crew rest. Two of those empty seats were located in the business class section of the cabin.

In addition to the unoccupied seats, Flight 417 carried 28 "non-revenue passengers." Non-revenue passengers include employees and relatives of employees of Olympic Airways and other airlines. Of these 28 passengers, eleven were seated in the cabin's smoking sections. Of the remaining 17 non-revenue passengers, two were seated in rows one and two in business class and 15 were seated in rows 15 through 36 in economy class.

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[4] There was some confusion at trial concerning the number of empty seats and how many of them were located in the non-smoking section of the plane. The Court's finding that there were eleven empty seats on the flight is supported by the flight's passenger manifest, the testimony of Captain Karayannis, and Olympic's admissions during discovery. Unfortunately, the evidence did not establish the precise location of these seats on the plane or how many of them were located in the non-smoking section.

As the flight progressed, ambient smoke continued to circulate in the area of row 48. Approximately two hours into the flight, the crew served a meal. The evidence before the Court establishes that Dr. Hanson ordered a meal and that he ate some portion of it. He also shared some of his food with his daughter, Sarah, and with a woman seated to his right. According to Sarah, Dr. Hanson "wasn't really eating that much" of his meal.

Immediately after the meal service, smoking increased noticeably in the rows behind the Husains. Around this time, Dr. Hanson became unusually quiet. At some point shortly after the meal, Dr. Hanson asked his wife for a new inhaler, indicating that the one he had been using had emptied. Ms. Husain retrieved a full inhaler from the overhead bin. Dr. Hanson turned around several times to look at the smoke in the rows behind him. He then told Sarah that the smoke was bothering his allergies, and decided to move toward the front of the cabin to breathe fresher air.

Sarah notified her mother of Dr. Hanson's discomfort, and Ms. Husain followed him to the front of the aircraft. Dr. Hanson walked forward a number of rows, stopping in the galley area between rows 19 and 20, well into the non-smoking area. When Ms. Husain reached him, he was leaning against a chair near the galley area. Dr. Hanson gestured to Ms. Husain to get the epinepherine that he carried in his emergency kit, which Ms. Husain had stored in a carry-on bag. Ms. Husain rushed to the rear of the plane to retrieve the epinepherine, then returned to the galley area and administered a shot to her husband in a pre-measured syringe.[5] She then ran to the rear of the cabin to wake Dr. Sabharwal.

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[5] The parties agree that the epinepherine administered to Dr. Hanson on Flight 417 was fresh and had been properly maintained.

Within seconds, Dr. Sabharwal, who, by chance, was an allergy specialist, arrived at the front of the plane to assist. Noticing that Dr. Hanson was in respiratory distress, Dr. Sabharwal pulled him onto the floor, gave him another shot of epinepherine (.20 ccs), and began to administer CPR.[6] At this point, Dr. Hanson's pulse was barely palpable. Dr. Sabharwal noticed that, while Dr. Hanson's lower airways were obstructed, his upper airway was not. For this reason, he was able to push some air into Dr. Hanson's lungs during the administration of CPR. During the treatment, Dr. Sabharwal also gave Dr. Hanson a shot of Bricanyl, which had been retrieved from the Husains' emergency kit.

At some point during this period, Ms. Husain requested that one of the flight attendants provide an oxygen canister and mask for her husband. According to Ms. Husain's testimony, two flight attendants attempted to open the oxygen canister, but were unable to do so.[7] Ms. Husain summoned Sarah, who was walking toward the front of the aircraft, and asked her to retrieve Dr. Hanson's oxygen canister with its nasal canula from the family's emergency kit. Sarah relayed this message to

[6] Although it is not entirely clear exactly how many shots of epinepherine Dr. Hanson received during the trauma that preceded his death, the testimony of Dr. Sabharwal, Ms. Husain, Isaac Husain and Sarah Husain confirm that at least two shots were administered, the first by Ms. Husain and the second by Dr. Sabharwal.

[7] The testimony regarding oxygen administration was entirely contradictory. Rubina and Isaac Husain both testified that the flight attendants were arranging an oxygen canister, but that they were unable to administer oxygen to Dr. Hanson. Ms. Husain, Dr. Sabharwal and Olympic flight attendant Eleni Xourgia all testified that Dr. Hanson was administered oxygen at some point during the incident with equipment obtained from the Husains' emergency kit. Theocharis Fotiades and Nikolaos Belkas testified that oxygen was supplied through Olympic's canister and mask.

her brother, Isaac, who brought the oxygen to Ms. Husain.

As they attempted to resuscitate Dr. Hanson, Dr. Sabharwal and Ms. Husain administered oxygen through a nasal canula. In addition, oxygen may have been administered through Olympic's canister with an attached mask. However, because Dr. Hanson was not able to breathe spontaneously, Dr. Sabharwal determined that the oxygen was not useful. About five minutes after Dr. Sabharwal arrived on the scene, the Olympic flight crew brought him a medical kit. By this point, however, Dr. Sabharwal believed that only a fully-equipped medical crash kit could save Dr. Hanson's life.

As time passed, a few other passengers arrived in the galley to assist Dr. Sabharwal, but no one was able to save Dr. Hanson. At approximately 4:40 p.m. Greenwich Mean Time, Dr. Sabharwal announced that Dr. Hanson had died.

During the entire incident, the airplane's captain never turned on the "no smoking" sign or otherwise requested that the passengers in the rear of the plane stop smoking.

III. The Medical Causes of Dr. Hanson's Death

For religious reasons, no autopsy was performed on Dr. Hanson's body after his death, and the direct cause of his fatal attack is a matter of some dispute. Plaintiffs argue that Dr. Hanson's death was caused by a severe asthma attack brought on by inhalation of cigarette smoke. Defendant, on the other hand, argues that Dr. Hanson died as a result of anaphylaxis caused by an allergic reaction to food, or that he died as a result of some other unknown medical problem. As discussed below, the Court finds that plaintiff has established by a preponderance of the evidence that smoke ingestion dur-

ing the first two hours of Flight 417 was a primary cause of Dr. Hanson's death.

Anaphylaxis is an allergic emergency which may be caused by an allergy to external material. Symptoms of anaphylaxis include skin discoloration, obstruction of the upper airway, disturbance in the intestinal tract, drop in blood pressure, shock or rapid, ineffective heartbeat. An asthmatic attack, on the other hand, is a reversible narrowing of the airway caused by air pollutants or other irritants, such as cigarette smoke.

The symptoms of asthma and anaphylaxis overlap significantly. Indeed, some severe asthma attacks may be characterized as anaphylactic reactions. In this case, the course of events with respect to the timing of the meal, Dr. Hanson's smoke inhalation, and the onset of his reaction support theories labeling the cause of death as both anaphylaxis and asthma. Both anaphylaxis and asthma attacks produce the same symptoms in the lower airway. Either can result in death. Epinepherine can be used to treat both anaphylaxis and asthma, but it is not necessarily efficacious in either case. The fact that Dr. Hanson received two or more injections of epinepherine during the flight and that the drug had no effect does not assist the Court in arriving at a cause of death.

Although anaphylaxis and asthma are sometimes difficult to differentiate, the Court finds that smoke played a significant causal role in Dr. Hanson's death. As both Dr. Golden and Dr. Wasserman acknowledged, cigarette smoke can act as an irritant. Moreover, the greater an individual's exposure to smoke, both in terms of time and intensity, the greater the irritant effect. As Dr. Golden explained in his testimony before the Court, the presence of an irritant can cause bronchospasm, constricting an individual's airways.

The Court finds significant the testimony of the Husain family and Dr. Sabharwal regarding Dr. Hanson's behavior in the Athens airport. During the hours-long delay in Athens, Dr. Hanson used his inhaler frequently and was increasingly bothered by the prevalent smoke. To escape the effects of the smoke, Dr. Hanson illicitly entered the first class lounge, where the air quality was slightly better. Dr. Hanson's problems in Athens indicate his sensitivity to smoke on the day in question.

Once the family was airborne toward New York on Flight 417, but prior to the in-flight meal service, Dr. Hanson again complained about the smoke. During the first hours of the flight, Dr. Hanson used his inhaler to remedy the effects of the smoky air while aboard the plane.[8] The Court cannot credit defendant's suggestion that Dr. Hanson's breathing problems prior to the meal were causally unrelated to his later asphyxiation. The evidence before the Court suggests exactly the opposite conclusion. Dr. Hanson explicitly complained that smoke was affecting his breathing just hours before his death, complained to his wife about the level of cigarette smoke on the plane, and relied extensively on his inhaler for support during the hours leading to his fatal attack. To conclude, as defendant urges, that the smoke on Flight 417 did not trigger Dr. Hanson's death is to ignore the chain of events leading up to his attack.

Defendant introduced evidence at trial to establish that Dr. Hanson may have died as a result of an anaphylactic

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[8] Although the Court heard no direct evidence that Dr. Hanson used his inhaler on the flight, the evidence shows that he was bothered by the smoke, and that he asked his wife for a new inhaler because the inhaler in his possession had become empty. In light of the fact that Dr. Hanson frequently relied on his inhaler to remedy the adverse effects of ambient smoke, the Court finds that he used his inhaler while aboard Flight 417.

reaction to yeast, tomatoes or grapes in the in-flight meal. This contention is belied by several facts in the record. First, there is no evidence that Dr. Hanson ate any grapes, tomatoes or bread-based products on the flight. In fact, the only credible evidence regarding Dr. Hanson's food intake was the testimony of his daughter, Sarah. According to Sarah, Dr. Hanson received a meal on the flight, but did not eat the whole thing, and in fact shared it with both of his neighbors. No witnesses testified that they observed Dr. Hanson eating any of the foods to which he was allergic while seated in row 48. Without further evidence of Dr. Hanson's sensitivities and his food intake aboard the flight, the Court cannot conclude that his death was caused by a reaction to the food.

Further, Dr. Hanson's death lacked certain symptoms that frequently appear in cases of anaphylaxis. Anaphylaxis caused by oral injection of an allergen commonly causes swelling in the upper airway. In this case, Dr. Sabharwal observed that Dr. Hanson's upper airway was not obstructed. Anaphylaxis frequently, but not always, causes discoloration, redness and hives on a victim's chest and neck. Dr. Sabharwal noticed none of those symptoms in this case.

Moreover, the testimony of Dr. Sabharwal, the only doctor who actually treated Dr. Hanson during his trauma, supports the Court's conclusion. While Dr. Sabharwal testified that he could not definitively diagnose the cause of Dr. Hanson's death, he did offer a differential diagnosis, assessing the likely causes of death in order of their probability. Dr. Sabharwal opined that, in light of Dr. Hanson's asthma and the obstruction of Dr. Hanson's airways, he most likely died as a result of status asthmaticus, or "totally uncontrolled asthma." The second most likely cause of death, according to Dr. Sabharwal, was anaphylaxis, and the third was "cardiac problems." Failing each of these potential causes, Dr.

Sabharwal concluded that Dr. Hanson's death may have been precipitated by unknown causes.

Dr. Golden's testimony further supports the Court's factual findings regarding the cause of Dr. Hanson's death. Dr. Golden testified that, in the absence of food, the only possible cause of death in this case would be an asthmatic reaction. Because Dr. Hanson may have eaten some of his meal, Dr. Golden concluded that it is difficult to distinguish whether Dr. Hanson's condition was anaphylaxis or asthma. However, Dr. Golden was able to conclude that smoke was a significant contributing factor in Dr. Hanson's death, regardless of whether he ate a meal on Flight 417.

Dr. Wasserman, defendant's expert witness in this case, attributed Dr. Hanson's death to asphyxiation or heart failure brought on by a reaction to an allergen, possibly tomatoes or yeast. Even Dr. Wasserman acknowledged, however, that cigarette smoke may have contributed to Dr. Hanson's death, although he was unable to determine the extent of that contribution.

In conclusion, the Court finds that Dr. Hanson's death was the result of respiratory distress which was caused by an exacerbation of his asthmatic condition due to the prolonged and extensive exposure to second-hand smoke on Olympic's Flight 417.

DISCUSSION

I. Applicable Law: The Warsaw Convention

This case is governed by the provisions of the Warsaw Convention[9] ("the Convention"). The Convention is a comprehensive international treaty governing the lia-

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[9] The Warsaw Convention is the popular name for the Convention for the Unification of Certain Rules Relating to International

bility of carriers in "all international transportation of persons, baggage or goods." *49 U.S.C. § 40105*. The purposes of the Convention were to achieve uniformity and to limit the liability of air carriers. *See El Al Israel Airlines v. Tseng, 525 U.S. 155, 119 S.Ct. 662, 671-72, 142 L.Ed.2d 576 (1999)*; *Carey v. United Airlines, Inc., 77 F.Supp.2d 1165, 1169 (D.Or.1999)*. The parties agree that, because Dr. Hanson's death occurred during international travel, the Convention provides plaintiffs' exclusive remedy. *See Tseng, 119 S.Ct. at 668*. ("[R]ecovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' if not available under the Convention, is not available at all.").

The Convention provides for strict liability for carriers in certain situations, and precludes liability altogether in others. Article 17 of the Convention explains that a carrier "shall be liable" for death or bodily injuries of passengers sustained during flight as the result of an "accident." Articles 20 and 22 limit a carrier's liability under Article 17 to $75,000 per passenger. However, under Article 25, the $75,000 limitation does not apply if the carrier has committed "wilful misconduct."[10] *See generally Hermano v. United Airlines, 1999 WL 1269187 (N.D.Cal. Dec. 21, 1999)*.

II. The "Accident" Requirement

Article 17 of the Convention provides that

> The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or

Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following *49 U.S.C. § 40105*.

[10] This term is more commonly spelled today as "willful misconduct." For the purposes of this memorandum, the Court will use the modern spelling except for direct quotations.

> any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft during the course of any of the operations of embarking and disembarking.

49 U.S.C. § 40105. The Supreme Court has interpreted this language to require the occurrence of an "accident" for a carrier to be held liable under the Convention. *See Air France v. Saks, 470 U.S. 392, 396, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985)*.

In *Saks*, the Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Saks, 470 U.S. at 405, 105 S.Ct. 1338*. The Court noted that "accident," as that term is used in the Convention, has a narrower definition than the term "occurrence." *Id. at 398, 105 S.Ct. 1338*. This inquiry is an objective one, and does not focus on the perspective of the person experiencing the injury. *See Gotz v. Delta Airlines, Inc.*, 12 F.Supp.2d 199, 201 (D.Mass.1998). Further, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident." *Saks, 470 U.S. at 406, 105 S.Ct. 1338*. It is the cause of the injury, not merely the occurrence of the injury, that must qualify as an accident. *See id. at 399, 105 S.Ct. 1338; Gotz, 12 F.Supp.2d at 201*.

Despite these limitations, the Court emphasized that its definition "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id. at 405, 105 S.Ct. 1338*. Other courts have also concluded that the term "accident" should be "interpreted broadly." *See Carey, 77 F.Supp.2d at 1170*.

The Supreme Court has also explained that, while the "accident" must cause the passenger's injury, it need not be the *sole* causal factor. *Saks, 470 U.S. at 405, 105 S.Ct.*

1338. Rather, because "any injury is the product of a chain of causes," a plaintiff under the Convention need only "prove that some link in the chain was an unusual or unexpected event external to the passenger." *Id. at 406, 105 S.Ct. 1338.*

In this case, plaintiffs posit three specific occurrences aboard Flight 417 that might be construed as "accidents" contributing to Dr. Hanson's death: (1) Ms. Leptourgou's three refusals to move Dr. Hanson to another seat; (2) the flight crew's inability to provide a usable oxygen canister in a timely manner; and (3) and the captain's failure to turn on the "no smoking" sign during Dr. Hanson's attack. As discussed below, the Court concludes that only the first of these occurrences was an "accident" which caused Dr. Hanson's death.

A. *Refusal to Move Dr. Hanson*

Plaintiffs first argue that Ms. Leptourgou's refusal to transfer Dr. Hanson to another row and her failure to follow company procedure was an "unusual" or "unexpected" event. The Court agrees.

The negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an "accident" under the Convention. *See Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 142 (2d Cir.1998)* (flight attendant negligently spilled scalding water on passenger while attempting to attend to passenger's earache). A claim "does allege an accident if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an 'accident' if those procedures or operations are carried out in an unreasonable manner." *Id. at 143; see also Schneider v. Swiss Air Transport Company Ltd., 686 F.Supp. 15 (D.Me.1988)*

(finding possible accident where flight attendant refused to assist passenger by asking other passengers sitting in front of her to raise their seats); *Langadinos v. American Airlines, Inc., 199 F.3d 68, 71 (1st Cir.1999)* (finding possible accident where flight attendant imprudently served alcohol to a passenger whose behavior was already "erratic" and "aggressive"); *Carey, 77 F.Supp.2d at 1171* (flight attendant's "acts of preventing plaintiff and his children from changing seats, engaging in heated, argumentative exchanges with plaintiff, informing him that he could be arrested if he did not stay in his seat and if his children did not stay in their seats, and publicly humiliating him meet the definition of 'accident' as articulated in *Saks*.").

Defendant argues that no unusual event occurred during the Husains' flight. According to defendant, ambient smoke is an expected and usual aspect of international flying. *See Warshaw v. Trans World Airlines, Inc., 442 F.Supp. 400 (E.D.Pa.1977)* (routine repressurization of cabin was not an accident, even though it caused plaintiff to lose his hearing); *Saks, 470 U.S. at 394, 105 S.Ct. 1338* (routine cabin pressurization during landing is not an accident); *Gotz, 12 F.Supp.2d 199* (injury to passenger during attempt to stow baggage in overhead compartment was not accident, because crew "worked perfectly").

The Court does not dispute that smoke in the cabin may be an expected aspect of international travel. Indeed, it is clear from the record that the Husains knew before boarding that the January 4 flight would have a smoking section. However, defendant's argument misses the mark. The smoke in the cabin was not the "unusual" or "unexpected" event which caused Dr. Hanson's death, although, as detailed above, the smoke undoubtedly had a significant place in the causal chain. Rather, the

unusual and unexpected event on which plaintiffs base their claim was the failure of the flight attendant to adequately respond to Ms. Husain's transfer requests. Indeed, in both *Warshaw* and *Gotz*, in which the courts found that injuries not attributable to unusual aircraft operations were not actionable under the Convention, the courts specifically mentioned that the injured passengers had *failed to request assistance from the flight crew.* In this case, the opposite is true. With increasing urgency, Ms. Husain three times requested the crew's assistance prior to her husband's death, and her request was thrice denied.

Under no reasonable interpretation of the facts can one conclude that Ms. Leptourgou's failure to assist Dr. Hanson was expected orusual. The Court has heard extensive testimony on the standard of care for flight attendants in situations such as this, and concludes that Ms. Leptourgou acted in an unexpected and unusual manner in several respects.

First, the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons. In this case, despite Ms. Leptourgou's repeated statements that the flight was full, eleven seats stood unoccupied. The Court can conceive of no acceptable reason for Ms. Leptourgou's refusal to assist Dr. Hanson after Ms. Husain's second and third requests. Moreover, according to Diane Fairechild, a flight attendant with 21 years of experience in international travel, even if the flight had no empty seats in the economy section, the crew should have transferred Dr. Hanson to an empty seat in the business class section of the cabin. Notably, Ms. Husain's suggestion to this effect during her third plea for a seat change went unheeded by Ms. Leptourgou.

Ms. Xourgia, now a chief cabin attendant working for Olympic, testified that, if she were in Ms. Leptourgou's position at the time of Ms. Husain's third request (i.e., after takeoff, when smoking had commenced in row 51), she would have transferred Dr. Hanson "immediately." Ms. Fairechild, testified that, according to recognized industry standard of care, Ms. Leptourgou "should have absolutely responded" to Ms. Husain's requests.

Second, even if the flight were entirely full, the flight attendant should have attempted to move Dr. Hanson. Ms. Fairechild testified that, when faced with a medical request like Ms. Husain's during a full flight, the crew will often attempt to entice other passengers to switch their seats. In this case, a seat transfer would not have been difficult to effectuate, considering that 17 passengers seated in the cabin's non-smoking section were "non-revenue" passengers. The evidence reveals that such a transfer would be appropriate under the controlling standard of care. Even Theocharis Fotiades, the chief cabin attendant on Flight 417, explained that Ms. Leptourgou should "definitely" have attempted to find another seat for Dr. Hanson when Ms. Husain made her requests.

Third, not only did Ms. Leptourgou's failure to act violate the accepted industry standard of care, it also violated Olympic Airways' policy. As Mr. Fotiades testified at trial, Olympic crew members generally make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery. Mr. Fotiades explained that this policy applies when a passenger must be moved because of smoke-related illness. Further, according to Mr. Fotiades, Olympic flight attendants are familiar with this policy Ms. Leptourgou, however, entirely ignored it. Such behavior cannot be considered either expected or usual.

Fourth, even if Ms. Leptourgou did not personally assist Dr. Hanson to find a new seat, Olympic policy required that she, at least, alert the chief cabin attendant ("CCA") of Ms. Husain's medical requests. Ms. Xourgia testified that as a flight attendant in Ms. Leptourgou's position, she would have immediately contacted the CCA when Ms. Husain requested a seat change prior to takeoff. Although no written policy was placed into evidence by the parties. Ms. Xourgia testified that written Olympic policies require that when a passenger indicates that he needs to be moved for a medical reason, the flight attendant must report that request to the CCA.

In this case, Ms. Leptourgou did not contact the chief cabin attendant to alert him to Dr. Hanson's medical condition or Ms. Husain's requests. In fact, according to the evidence before the Court, Ms. Leptourgou did not contact any other members of the flight crew concerning Ms. Husain's three requests. Nor did she ask another member of the crew whether or not the flight was full. Mr. Fotiades, the chief cabin attendant, did not learn about Ms. Husain's requests for a seat change until after Dr. Hanson had died. Had he learned of the requests earlier in the flight, Mr. Fotiades testified that he would have made further inquiries and attempted to move Dr. Hanson to another seat.

Finally, because of Ms. Husain's precautionary actions in both the New York and the Cairo airports, Ms. Leptourgou's failure to assist Dr. Hanson is even more unexpected and unusual than in the typical case of a passenger transfer request. At the New York airport where the Husains first learned that Olympic permitted smoking on its flights, Ms. Husain informed the check-in agent that her husband was "susceptible to smoke" and could not "be in any smoke." As a result of this initial conversation, the Husains had reason to expect that

Olympic was aware of Dr. Hanson's sensitivity to smoke. This expectation was further bolstered by Ms. Husain's conversation with the check-in agent at the Cairo airport prior to the family's return trip. After the Husains were given their tickets in Cairo, Ms. Husain returned to the counter to ensure that her husband had been given a seat in the non-smoking sections of the two return flights. At that time, Ms. Husain showed the agent a letter from Dr. Hanson's brother explaining that Dr. Hanson had a history of asthma. Again, one would expect that, as a result of this conversation, Olympic was aware of Dr. Hanson's medical needs. In light of this fact, Olympic's subsequent failure to move Dr. Hanson after three requests is even more unusual and unexpected.

Moreover, Dr. Hanson's expectation that Ms. Husain's requests would be accommodated was even more reasonable in light of the normal operating procedures of international carriers. Diane Fairechild testified that medical information and special requests like Ms. Husain's are normally inputted in a "special information log," which is given to the airplane's CCA prior to takeoff. The log serves to inform the CCA of the special needs of the passengers. In this case, despite Ms. Husain's warnings to Olympic check-in agents regarding her husband's condition, nothing to that effect appeared in Olympic's special information log. A passenger in Dr. Hanson's position should expect that medical needs expressed to an agent prior to check-in will be considered once the flight has been boarded. In Dr. Hanson's case, that reasonable expectation was not met.

In sum, Ms. Leptourgou's behavior was far from usual or expected. She violated the industry standard of care, she misrepresented to Ms. Husain that the flight was full, and she acted in contravention of accepted Olympic

Airways policy. This aberrant behavior was both unexpected and unusual.

In the face of this evidence, defendant analogizes to a number of published cases in which the Convention's "accident" requirement was narrowly applied. For instance, defendant relies on *Margrave v. British Airways, 643 F.Supp. 510 (S.D.N.Y.1986)*, in which the district court noted that sitting in "a very cramped position" during a flight delay is neither unusual nor unexpected. The plaintiff in *Margrave* sat in her seat for approximately five hours while her plane waited for takeoff. Because "normal travel procedures" were followed by the crew, the court concluded that no "accident" had occurred. *Id. at 512*. Defendant argues that, under *Margrave*, sitting in an assigned seat cannot be considered an "accident," even if remaining seated causes injury to the passenger. However, *Margrave* is distinguishable from the instant case. In *Margrave*, the plaintiff never told a flight attendant about her discomfort. *Id. at 511*. In contrast, here the unusual event was not Dr. Hanson's seat location, but the flight attendant's refusal to accommodate his needs despite three requests.

Defendant also cites a number of cases in which the crew's failure to assist an ailing passenger was held to not constitute an "accident." For instance, in *Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir.1997)*, the Eleventh Circuit held that an airplane crew's negligent decision to continue a flight to its scheduled destination despite a passenger's in-flight heart attack was not an actionable "accident" under Article 17. *See also McDowell v. Continental Airlines, 54 F.Supp.2d 1313, 1320 (S.D.Fla.1999)* (reluctantly following *Krys*); *Fischer v. Northwest Airlines, Inc., 623 F.Supp. 1064, 1065 (N.D.Ill.1985)* (refusal to aid passenger with heart attack was not "accident"). *But see*

Seguritan v. Northwest Airlines, Inc., 86 A.D.2d 658, 446 N.Y.S.2d 397, 398-99 (N.Y.App.Div.1982) ("The 'accident' is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of defendant's employees to render her medical assistance.").

The seminal case in this line of "failure to assist" decisions is *Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir.1984)*. In *Abramson*, the plaintiff was suffering from a preexisting paraesophagael hiatal hernia when he boarded the flight. The plaintiff's condition worsened during the flight, and he asked the flight attendant if he could lie down in empty seats so that he could apply a useful "self help" remedy which included massaging his stomach and occasionally inducing vomiting. *Id. at 131*. The court found that no accident had occurred because the aggravation of the passenger's injury was not an unusual or unexpected occurrence. *Id. at 132*. The court noted that "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id. at 133*.

Each of these cases, including *Abramson*, is distinguishable from the one at bar. Unlike Dr. Hanson, the passengers in each of the cited cases suffered an injury as a result of entirely "internal" forces. While the inaction of the crew may have aggravated the passengers' injuries, it did not precipitate the injuries as such. Here, on the other hand, the flight attendant's failure to transfer Dr. Hanson—or her failure to at least follow the proper procedures—*precipitated* Dr. Hanson's injury and death. *See Fishman, 132 F.3d at 141-142* (distinguishing *Abramson* and *Fischer* on similar grounds).

Additionally, none of the cases cited by defendant arose from a crew member's blatant disregard of industry standards and airline policies. As described above, the testimony in this case indicates that Ms. Leptourgou's actions were anything but usual. When a passenger boards an airplane, he or she should be able to expect that the flight crew will comply with accepted procedures and rules. A failure to do so is unexpected.

Finally, to the extent that any of defendant's cited cases are not distinguishable from the instant case, the Court finds that they are both unconvincing and non-binding in this Circuit. The Court finds little merit in the notion that a flight crew has no legal obligation to care for its ill or endangered passengers. The practical effect of cases like *Abramson* is to dissolve the airlines' duty of care and to "create[ ] an incentive to airlines engaged in international travel not only not to exercise the highest degree of care but to completely refuse to treat" or assist passengers with medical problems. *McDowell, 54 F.Supp.2d at 1320.* In the absence of binding authority, the Court declines to adopt such a rule.[11]

The Court concludes that when a flight attendant's acts create a foreseeable risk of injury to passengers, an "accident" has occurred. *See Langadinos, 199 F.3d at 71.* In this case, Ms. Leptourgou's failure to respond appropriately to Ms. Husain's requests and her failure to

[11] Additionally, the Court cannot turn a blind eye on the sudden sea change in interpretation of the Convention that has occurred in the wake of the Supreme Court's recent decision in *Tseng, supra.* In reaching its conclusions of law in this case, the Court agrees with the *McDowell* court that cases such as *Abramson* and *Krys* create "absurd results" in the wake of *Tseng. McDowell, 54 F.Supp.2d at 1319.* Viewed in the proper context, the holdings of these pre-*Tseng* cases are less than compelling. *See generally McDowell, 54 F.Supp.2d at 1319* (discussing the effect of *Tseng* on Warsaw Convention jurisprudence).

comply with the applicable standards of care were both "unexpected" and "unusual." *See Tsevas v. Delta Air Lines, Inc., 1997 WL 767278 (N.D.Ill. Dec. 1, 1997)* (flight attendant's failure to move passenger upon request in order to keep her away from a second passenger's lewd behavior was an "accident" under Article 17). Therefore, Ms. Leptourgou's behavior is actionable under the Warsaw Convention.

Having concluded that Ms. Leptourgou's failure or refusal to assist Dr. Hanson constituted an "accident," the Court must next consider whether that "accident" caused Dr. Hanson's death. As discussed above, the coincidental occurrence of both an accident and an injury aboard an international flight does not necessarily support a cause of action under the Convention. To prevail, plaintiffs must establish that the accident *caused* the injury. *Gotz, 12 F.Supp.2d at 201.* In *Saks,* the Supreme Court recognized that "any injury is the product of a chain of causes." *Saks, 470 U.S. at 406, 105 S.Ct. 1338.* To establish liability, a plaintiff need only "prove that some link in the chain was an unusual or unexpected event external to passenger." *Id.* Courts have traditionally applied regular proximate cause analysis to determine carrier liability under the Convention. *See Margrave, 643 F.Supp. at 512.*

In light of this standard, the Court finds that Olympic's failure to move Dr. Hanson caused Dr. Hanson's death. As discussed above, Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction. Dr. Hanson was seated in row 48, only three rows in front of the designated smoking section. Four witnesses at this trial were seated in Dr. Hanson's vicinity on Flight 417, and all four noted that the ambient smoke was noticeably thick in row 48. At several points in the flight, Dr. Han-

son indicated his discomfort with the seating arrangement. As noted above, Ms. Leptourgou or another member of the Olympic crew could have moved Dr. Hanson to any of the eleven empty seats on the plane or to one of the 17 non-smoking seats occupied by non-revenue passengers. If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417. Therefore, the Court must conclude that Dr. Hanson's death was caused by an accident, triggering liability under the Warsaw Convention.

B. Administration of Oxygen

In addition to Ms. Leptourgou's failure to move Dr. Hanson to another seat, plaintiffs argue that two other "accidents" occurred aboard Flight 417 which caused Dr. Hanson's death. First, plaintiffs assert that defendant's failure to effectively administer oxygen to Dr. Hanson through a face mask should be considered an "accident" under the Convention. According to plaintiffs, Dr. Hanson may not have died if the flight crew had properly prepared and supplied oxygen during Dr. Hanson's fatal attack.

To resolve this question, the Court must engage in a three-step inquiry. First, the Court must decide whether, as a purely legal matter, the failure to properly administer oxygen can be considered an accident. Second, the Court must decide as a factual matter whether the acts of the flight crew in this case constituted an unexpected or unusual event. If so, the Court must finally determine whether the flight crew's acts caused Dr. Hanson's death.

Turning first to the legal issue, the Court is aware of two published cases which address the question of whether an airline may be held liable under the Convention for the failure to properly administer oxygen. In *Tandon v. United Air Lines, 926 F.Supp. 366*

(S.D.N.Y.1996), the plaintiff suffered a heart attack during an international flight. When a doctor attempted to administer oxygen from the airplane's on-board canister, he discovered that the canister had expired two month's earlier, and that it contained insufficient oxygen supply. *Id. at 368.* The plaintiff did not receive proper care, and died aboard the flight. The district court found that, because no unusual or unexpected event external to the plaintiff had *triggered* the plaintiff's heart attack, the later failure of the defendant to save her did not constitute an accident. *Id. at 369.*

The Court declines to follow the rule enunciated in *Tandon*. The Court cannot agree with the *Tandon* court that an expired oxygen container or a negligently maintained medical kit can somehow be considered an "expected" or "usual" aspect of international flight. Rather, the Court adopts the reasoning of the district court in *McDowell v. Continental Airlines, 54 F.Supp.2d 1313 (S.D.Fla.1999)*. In *McDowell*, the court noted that improper maintenance of a carrier's on-board medical equipment can be considered an "accident." *54 F.Supp.2d at 1318.* In determining whether an accident had occurred, the court considered the carrier's level of care in maintaining the medical kit and the carrier's compliance or noncompliance with federal regulations and industry standards. *Id. at 1318.* Although the court in *McDowell* concluded that the plaintiff had failed to establish facts showing negligent maintenance of the on-board medical kit, the court's discussion is instructive. Therefore, the Court holds that the failure to properly maintain or administer oxygen to an ailing passenger aboard an international flight may be considered an accident.

The Court must next apply this legal conclusion to the facts of this case. As described above, the testimony on this subject is contradictory at best. Both Dr. Sabharwal

and Ms. Husain testified that the Olympic crew members were unable to provide bottled oxygen with an attached mask, while members of the crew testified that they did, in fact, provide an oxygen mask and canister, and that the apparatus functioned properly. Mr. Fotiades was particularly adamant in his testimony that he observed Dr. Hanson breathing oxygen through an Olympic-supplied mask at some point during the incident.

In light of this conflicting testimony, the Court finds that the evidence on the question of the oxygen administration is inconclusive. While the flight crew may have had some trouble preparing the oxygen when first asked by Ms. Husain, it is far from clear that the Olympic oxygen canister and mask were not used on Dr. Hanson or that the delay during the flight crew's troubles lasted more than a few moments. The Court notes that the time period between Ms. Husain's first request for oxygen and Dr. Hanson's death was approximately ten minutes. During a significant portion of that time, Dr. Sabharwal and Ms. Husain were administering CPR, making the availability of oxygen irrelevant. In the flurry of intense activity that preceded Dr. Hanson's death, it is possible that both Ms. Husain and Dr. Sabharwal failed to notice that Olympic's oxygen tank was in use.

Additionally, even if the flight crew did have some trouble preparing the oxygen canister, the Court cannot find that an accident necessarily occurred. In the heat of the moment, a certain amount of fumbling is normal and expected, even by experienced flight attendants. Plaintiffs have not established that the flight crew's problems providing an oxygen canister lasted for a significant period of time.

In sum, the Court finds that plaintiffs have failed to meet their burden of establishing that the flight crew's behavior in preparing the oxygen was unusual or unexpected. Therefore, the Court concludes that the flight crew's acts during Dr. Hanson's fatal attack did not constitute an accident.

Further, even if the acts of the flight crew could be described as an "accident," the Court finds as a matter of fact that any failure to properly administer oxygen did not cause Dr. Hanson's death. Even if the flight crew did commit an error, the Court cannot conclude that this error provided a link in the causal chain that resulted in Dr. Hanson's death. *See Saks, 470 U.S. at 406, 105 S.Ct. 1338.* In reaching this conclusion, the Court is cognizant of the testimony of Dr. Zarir G. Marawala, who explained that a nasal canula is typically less effective than a mask when a patient is experiencing respiratory distress. According to Dr. Marawala, a person in such a condition is more likely to attempt to breathe through his mouth.

While this may be true as a general proposition, the Court finds that the use of a mask would not have been useful in this case. By the time Ms. Husain and the Olympic crew attempted to administer oxygen to Dr. Hanson, his condition had progressed beyond salvation. According to the testimony of Dr. Wasserman, the administration of oxygen by way of a mask or a nasal canula is generally useless when a patient is experiencing airway obstruction. After reviewing the entire record, Dr. Wasserman concluded that any error in the administration of oxygen and CPR to Dr. Hanson did not cause his death. Rather, by the time Dr. Hanson was seated in row 19, properly-administered oxygen, even through a mask, would not have prevented Dr. Hanson's death. Dr. Golden's testimony also supports this conclusion. According to Dr. Golden, when a patient's airways are constricted, an oxygen mask is no more effective than a nasal canula.

On the basis of this testimony, the Court concludes that, even if the flight crew's delay in providing oxygen to Dr. Hanson constituted an "accident" under the terms of the Convention, that "accident" did not cause Dr. Hanson's death.

C. Failure to Ignite "No Smoking" Sign

Plaintiffs also argue that a separate "accident" occurred when the flight crew failed to request that the smoking passengers extinguish their cigarettes. Plaintiffs argue that the captain should have ignited the sign to ensure that no passengers would smoke in the vicinity of Dr. Hanson during his attack. According to plaintiffs, the failure of the captain and the flight crew to request that other passengers stop smoking while Dr. Hanson received oxygen constituted an "unusual" or "unexpected" event.

The Court rejects this argument for three reasons. First, according to the testimony of Olympic Airways captain Demetrios Karayannis, it is not standard procedure to ignite the "no smoking" whenever a passenger is experiencing medical problems. Viewed in light of this testimony regarding the standard of care, the Court cannot credit plaintiffs' argument.

Second, the Court finds nothing in the record to suggest that any passengers were smoking in the vicinity of Dr. Hanson while he received oxygen. Indeed, the smoking section of the airplane began in row 51, but, by the time the crew was aware of Dr. Hanson's distress, he was seated 31 rows away in row 19. Therefore, the flight crew's failure to turn on the "no smoking" sign did not constitute an unexpected or unusual event.

Finally, as discussed above, by the time the administration of Dr. Hanson's oxygen began, his condition had already become irreversibly fatal. Whatever minimal

level of ambient smoke may have reached row 19 during the incident, it certainly had no effect on Dr. Hanson's treatment, and did not cause his death.

III. Willful Misconduct

As discussed in section IIA above, Ms. Leptourgou's failure to move Dr. Hanson to another seat was an "accident," creating liability under the Warsaw Convention. Carrier liability under the Convention is normally limited to $75,000 per passenger. However, that limitation on damages does not apply if the defendant airline committed willful misconduct in causing the accident. *See Koirala v. Thai Airways Int'l, 126 F.3d 1205, 1209 (9th Cir.1997)*. Article 25, the Convention's "willful misconduct" provision, does not create a distinct cause of action separate from Article 17, the Convention's "accident" provision. *See McDowell, 54 F.Supp.2d at 1320.* Rather, Article 25 simply modifies the potential recovery of a passenger who has established the occurrence of both an "accident" and "willful misconduct." *Id.* In other words, if no "accident" occurred on the flight, the Court cannot find that defendant is separately liable for the "willful misconduct" of the crew. In this case, because the Court has concluded that an "accident" caused Dr. Hanson's death, the Court must next determine whether the behavior of the flight crew constituted "willful misconduct."

The Ninth Circuit has defined "willful misconduct" as "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage or the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences." *Koirala, 126 F.3d at 1209. See also Hermano, 1999 WL 1269187 at *5* (citing *Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1290*

(11th Cir.1999)) (to establish willful misconduct, plaintiff must show that defendant acted with "intent to cause damage" or " 'recklessly and with knowledge' that damage would probably result."). In a case published earlier this year, the Fourth Circuit considered whether "willful misconduct" requires subjective or objective recklessness. *See Bayer Corp. v. British Airways, PLC, 210 F.3d 236 (4th Cir.2000)*. The court concluded that the former standard was more appropriate, noting that "[o]n a mens rea spectrum from negligence to intent, article 25's standard is very close to the intent end." *Id. at 238*. Rather than establishing that the actor "should have known" of an obvious risk, the plaintiff in a case brought under the Warsaw Convention must, at a minimum, prove that the actor "must have known" of the risk in order to establish willful misconduct. *Id. at 239* (quoting *Piamba, 177 F.3d at 1291)*. The plaintiff bears a "heavy burden" in proving willful misconduct. *Id.; see also Saba v. Compagnie Nationale Air France, 78 F.3d 664, 668 (D.C.Cir.1996)* (requiring plaintiff to show actor's subjective state of mind in order to prove "willful misconduct"); *Piamba Cortes, 177 F.3d at 1291*. Although the Ninth Circuit has not explicitly decided whether Article 25 requires an element of subjective knowledge, the *Koirala* court held that "conscious and reckless disregard" of the crew's duties constituted willful misconduct under the Convention. *Koirala, 126 F.3d at 1212*. For the purposes of this decision, the Court will assume that the Article 25 requires a finding of subjective recklessness.

The Court must note, however, that Ms. Leptourgou's subjective state of mind "may be established solely by inferences taken from circumstantial evidence; the inferences thus act as 'a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent.' " *Piamba Cortes, 177 F.3d at*

1286 (quoting *Saba, 78 F.3d at 668)*. In fact, it is possible to infer subjective recklessness based on "the very fact that the risk was obvious." *Id. at 1291* (quoting *Farmer v. Brennan, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)*).

In this case, the Court finds that the flight attendant's failure to move Dr. Hanson or to report Ms. Husain's request to the CCA was "willful misconduct." The Court concludes that, at the time of her third refusal to assist Dr. Hanson, Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury. The Court reaches this conclusion only after a careful examination of the testimony and the circumstances of Ms. Leptourgou's repeated refusals to help the Husains.

A number of considerations support the Court's conclusion. First, the Court finds that, at the time of the accident, Ms. Leptourgou was aware of the industry standard of care described in section II, *supra*. Mr. Fotiades testified at trial that the flight attendants working under his supervision were aware of the appropriate responses to seat transfer requests. Second, the Court finds that Ms. Leptourgou was aware of Olympic's specific policy requiring that a flight attendant inform the CCA when a passenger requests a seat transfer for medical reasons. Ms. Xourgia testified that Olympic flight attendants receive formal training on this policy. Third, the Court finds that Ms. Leptourgou must have known that Flight 417 was not "totally full," as she informed Ms. Husain. The evidence shows that Ms. Leptourgou passed through the cabin prior to takeoff to ensure that all passengers were seated. During this walk-through, Ms. Leptourgou must have seen several empty seats. In

the face of this inference, defendant has submitted no evidence whatsoever to suggest that Ms. Leptourgou did not know or might not have known that the plane contained empty seats.

From this understanding, the Court next turns to the crucial testimony of Ms. Husain. Because Ms. Leptourgou was not available to testify in this trial, Ms. Husain's memory of her conversations with the flight attendant are entirely uncontested. The Court finds Ms. Husain's testimony on this topic highly credible.

The testimony of Ms. Husain makes one thing clear: Ms. Husain was not merely a typical passenger complaining about an inconvenient seat assignment. Ms. Husain made three requests to be moved. Nothing in the record indicates that any other passenger requested any such assistance more than once. Additionally, each of Ms. Husain's requests was more emphatic and desperate than the last. Once the passengers seated behind Dr. Hanson had begun to smoke, Ms. Husain's pleas reached a level of unmistakable urgency and seriousness. According to her testimony, Ms. Husain literally *begged* Ms. Leptourgou to move her husband. She told the flight attendant, "I don't care if the plane is full. Sit him on the carpet, sit him in first class, but don't sit him here." The Court finds that Ms. Husain communicated her husband's problem to the flight attendant so emphatically that Ms. Leptourgou must have recognized the danger. Further, Ms. Husain indicated to Ms. Leptourgou several times that she wanted only her husband moved, not the rest of the family. The fact that Ms. Husain was willing to sit apart from her husband during the entire ten-hour flight should have indicated to the flight attendant that the situation was serious enough to merit further consideration. After hearing the testimony of Ms. Husain, the Court concludes that Ms. Leptourgou cannot have

failed to recognize that Dr. Hanson's problem was a medical one and that sitting near the smoking section was likely to cause him injury.

Moreover, the evidence suggests that Ms. Leptourgou *did* in fact recognize the seriousness of Ms. Husain's request, even though she failed to respond appropriately. The fact that Ms. Leptourgou gave Ms. Husain permission to act on her own to find another seat indicates that she understood the seriousness of Ms. Husain's entreaties. Clearly, Ms. Leptourgou understood that Dr. Hanson's problem was serious enough to merit a seat transfer of some type. Her subsequent failure to assist Ms. Husain or to follow standard procedures by contacting the CCA is inexplicable. The Court can only conclude that by refusing to perform her duties, Ms. Leptourgou deliberately closed her eyes to the probable consequences of her acts. This was willful misconduct.

Defendant has suggested that, because Ms. Leptourgou could not have known that Dr. Hanson would die as a result of his allergy, she could not have recognized the risks inherent in her actions. While the Court agrees that Ms. Leptourgou did not know that Dr. Hanson would die if not moved, this fact alone does not preclude a finding of willful misconduct. Plaintiffs must show only that Ms. Leptourgou was aware that her refusal to assist Dr. Husain was likely to cause an injury to him; they need not establish that Ms. Leptourgou was aware of the exact injury that her act was likely to cause. *See Saba, 78 F.3d at 668.* In other words, Ms. Leptourgou need not have known, and in all likelihood did not know, that Dr. Hanson might die as a result of her refusal to assist him. However, for the reasons discussed above, she did know—she *must have known*—that her acts in violation of recognized policy were likely to cause him injury.

Defendant has also suggested that Ms. Husain should have been even more explicit than she was in making her pleas to Ms. Leptourgou. No doubt she could have used precise medical terms rather than stating that her husband was "allergic" to smoke. Arguably, she could have explained that her husband had suffered two serious medical incidents in the previous year that required the assistance of the paramedics. Perhaps these more explicit explanations would have propelled the flight attendant to take the appropriate action. However, the Court rejects this argument for two reasons. First, as explained above, Ms. Husain's pleas, while factually bare, were sufficiently straightforward to alert Ms. Leptourgou of the impending danger and the need to move Dr. Hanson to another seat. Ms. Husain's use of the term "allergic to smoke" notified Ms. Leptourgou that Dr. Hanson's problems were medical in nature, even though her words may have been medically imprecise. Further, the emotional urgency of Ms. Husain's requests, which was conveyed in her testimony before this Court, informed Ms. Leptourgou of the potential seriousness of Dr. Hanson's medical problems. Although Ms. Husain did not use the word "asthma" or describe the incident in Las Vegas, Ms. Leptourgou must have known the gravity of Dr. Hanson's condition.

Second, the Court declines to place the unreasonable burden on airplane passengers to provide a detailed explanation of their medical history in order to receive the mandatory and expected acceptable level of service. When aboard a commercial airplane, passengers can be anxious and inarticulate. Airline regulations, both written and unwritten, recognize that passengers are not always able to completely articulate their-needs. For this very reason, airlines create policies and procedures, such as Olympic Airways' requirement that a flight attendant

must inform the chief cabin attendant upon learning of a passenger's medical needs. At a minimum, compliance with such procedures leads to a more accurate exchange of information between the passenger and the crew. Ms. Leptourgou knew that Dr. Hanson had a susceptibility to smoke, knew that his wife feared serious injuries if he remained in row 48, knew that the flight was not entirely full, and knew that Olympic regulations required her to contact the CCA and/or to make an effort to move Dr. Hanson. In spite of all this knowledge, she did nothing.

Ms. Fairechild, a 21-year veteran of commercial airline service, testified to the egregiousness of Ms. Leptourgou's behavior, noting that she was "shocked" by Ms. Leptourgou's failure to act and labeling it "criminal." After reviewing the record, Ms. Fairechild testified that "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." In light of all this evidence, the Court must conclude that Ms. Leptourgou's behavior constituted willful misconduct, as that term has been interpreted under the Warsaw Convention. *See Koirala, 126 F.3d at 1211* (finding inference of willful misconduct based on expert testimony that "the flight crew's actions in this case were 'completely substandard of any scheduled airlines in the world.' ").

IV. Comparative Negligence

The Court must next turn to the difficult question of comparative negligence. While the Warsaw Convention creates a strict liability standard for injuries caused by accidents during international travel, that liability is not absolute. Article 21 of the Convention provides:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured

> person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Both parties agree that the Court should apply California's comparative negligence standard in this case rather than a traditional contributory negligence standard. *Accord Eichler v. Lufthansa German Airlines, 794 F.Supp. 127, 130 (S.D.N.Y.1992)* (applying federal common law comparative negligence standard); *Bradfield v. Transworld Airlines, Inc., 88 Cal.App.3d 681, 685, 152 Cal.Rptr. 172 (1979)* (applying state law comparative negligence standard).

A recent unpublished district court opinion from New York perhaps best describes the Convention's rule regarding comparative negligence. *See Eichler v. Lufthansa German Airlines, 1994 WL 30464 (S.D.N.Y. Jan. 28, 1994)*. The *Eichler* court noted the apparent incongruity of the Convention's no-fault standard of liability under Article 17 and its consideration of contributory negligence under Article 21. Analogizing to the arena of strict products liability, the court concluded that Article 21's standard is best described as a "comparative causation" standard rather than a "comparative fault" standard. In other words, although the predicate for triggering Article 21 is negligence, "the basis for apportioning liability is the *comparative responsibility or causation* of the parties." *Id. at* *5 (emphasis added). The Court adopts this well-reasoned interpretation of the Convention.

Accordingly, the Court must consider two questions. First, the Court must determine whether Dr. Hanson acted negligently during Flight 417. If the Court answers that question in the affirmative, it must next consider the comparative causation of Ms. Leptourgou's refusal to

assist Dr. Hanson and Dr. Hanson's own negligent failure to act.

A. Dr. Hanson's Negligence

Defendant suggests that Dr. Hanson was negligent in two ways. First, defendant contends that Dr. Hanson's failure to request to speak with Ms. Leptourgou's supervisor was unreasonable. Second, defendant asserts that Dr. Hanson's failure to make any attempt to find another passenger who was willing to switch seats with him was also negligent. The Court will address these two arguments in turn.

1. Failure to Seek Assistance of Supervisor

First, defendant suggests that Dr. Hanson and Ms. Husain should not have merely accepted Ms. Leptourgou's refusal to move Dr. Hanson. Rather, they should have requested to speak with Ms. Leptourgou's supervisor. The Court disagrees. Imposing such a duty would place an unreasonable burden on a passenger, penalizing her for obeying the instructions of a flight attendant. Moreover, it is not realistic to expect Ms. Husain to understand the flight crew hierarchy aboard commercial aircraft. Indeed, as Ms. Husain testified at trial, she did not know at the time of the incident that Ms. Leptourgou even had a supervisor. A reasonable passenger in Ms. Husain's position would have reached precisely the conclusion that Ms. Husain herself reached after listening to the flight attendant's final rebuff: her husband could either remain in his assigned seat or take it upon himself to exchange seats with another passenger. The Court cannot fault either Dr. Hanson or Ms. Husain for failing to realize that the aircraft also carried a CCA to supervise the flight attendants.

2. *Failure to Attempt to Move Independently*

Defendant's second argument is far more persuasive. The Court finds that Dr. Hanson was negligent in failing to attempt to transfer his seat after Ms. Husain's third interaction with Ms. Leptourgou. As described above, after Ms. Husain's third request to move her husband, the flight attendant responded that the plane was full and that she could not move Dr. Hanson. She then told Ms. Husain, "You have to go ask people yourself."

Without question, Ms. Leptourgou's instruction to Ms. Husain was inappropriate in light of Olympic's policies. However, once the flight attendant granted Dr. Hanson and Ms. Husain permission to find a seat on their own, that option was available to them. Dr. Hanson, after apparently weighing the potential risk to himself against the inconvenience, discomfort and probability of success of personally requesting a seat transfer from other passengers, chose not to act. The Court finds that this decision was unreasonable under the circumstances.

Dr. Hanson was in a unique position to understand precisely how serious his condition was. He knew his medical history. He was aware of his near-fatal attack in Las Vegas and his breathing troubles in Alameda. As a doctor, he probably understood his condition and the risks associated with it. He alone knew exactly how the ambient smoke was affecting his body during the hours leading up to his death. In other words, like Ms. Leptourgou, Dr. Hanson must have known that he would probably be injured if he remained in row 48. Ms. Leptourgou presented him with an option to escape the potential injury that inhaling the smoke-filled air would cause: he could walk toward the front of the cabin and approach other passengers to ask them to switch seats with him. In light of what Dr. Hanson knew and what he should have known, the Court concludes that he should

have accepted Ms. Leptourgou's option, as unappealing as it may have appeared. The failure to do so constituted negligence.

B. Comparative Causation

While Dr. Hanson's failure to act was negligent, that negligence does not necessarily eradicate the effects of Ms. Leptourgou's wrongdoing. Dr. Hanson does not bear the full responsibility for the events that transpired after the meal service. *Either* Dr. Hanson *or* Ms. Leptourgou could have taken action to move Dr. Hanson to the front of the plane. Both should have taken such action. Neither can point to the other as being solely responsible for Dr. Hanson's death. The Court must therefore determine how each actor's wrongful or negligent decisions contributed to the tragedy that followed.

At first glance, it may appear that Dr. Hanson's failure to act played the larger role in causing his death. As discussed above, he had intimate knowledge of both the extent of his sensitivity to smoke and the effect of the ambient smoke on his ability to function during the flight. Further, it was Dr. Hanson who made the ultimate decision not to attempt to move. Viewing the facts from this perspective, whatever Ms. Leptourgou's culpability, Dr. Hanson should bear the greater responsibility for causing his own death.

After careful consideration of the evidence, the Court concludes that this "first glance" position is incorrect for two reasons. First, while Dr. Hanson should have attempted to switch seats with another passenger, there is no guarantee at all that his actions would have resulted in his finding a new seat farther from the smoking section. Nothing in the record indicates that other passengers would have been willing (or are typically willing) to switch seats at the request of a fellow passenger with

an assigned seat in close proximity to the airplane's smoking section. Further, it is far from clear that Dr. Hanson would have discovered the availability of the eleven unoccupied seats during his proposed sojourn to the front of the cabin. The evidence before the Court establishes that, to the average observer, the plane appeared to be full. The open seats were likely scattered throughout the cabin, and were difficult to see with an unfamiliar eye. Dr. Hanson may not have discovered an empty seat or found another passenger willing to swap seats.

On the other hand, if Ms. Leptourgou had acted properly, it is highly unlikely that Dr. Hanson would have remained in row 48. It is far more likely that, had Ms. Leptourgou followed the appropriate procedures, the CCA would have been able to move Dr. Hanson into one of the empty non-smoking seats. Further, the CCA also had unique knowledge as to which passengers were "non-revenue" passengers who could be easily asked to move. Therefore, in terms of likely outcomes, Ms. Leptourgou's failure to act was of greater consequence than Dr. Hanson's.

Second, although Ms. Leptourgou gave Dr. Hanson and Ms. Husain her permission to search for another seat, the fact remains that the flight attendant was in a far better position to effectuate a change. Ms. Leptourgou had knowledge of the flight crew hierarchy and had access to the CCA and his additional knowledge and influence. She also had the ability to find Dr. Hanson an open seat without any significant effort. Further, as a trained flight attendant, she had both experience and expertise in making requests such as the one she suggested that Ms. Husain make on her own. None of this can be said for Dr. Hanson himself. In other words, Ms. Leptourgou, had she merely responded to Ms. Husain's

pleas in an appropriate manner, could have achieved a seat transfer with far less effort than Dr. Hanson acting alone.

When a passenger enters a commercial flight, he surrenders a certain level of freedom—freedom of movement, of expression and of choice—in return for a promise of safety and comfort. Passengers agree to abide by a set of rules; they are expected to behave in a certain way in order to avoid communal danger. As an element of this unwritten compact, passengers bestow upon the airline and the flight crew nearly absolute authority to control and manipulate the mobile environment for the benefit of all those aboard. Courts have recognized this authority in both civil and criminal contexts. *See, e.g., 49 U.S.C. § 44902; 14 C.F.R. § 91.11.* Passengers grant a certain level of power to the airlines, but with that power comes responsibility. The flight crew has the unique ability to provide comfort and safety during air travel, which passengers have the right to expect. *See McDowell, 54 F.Supp.2d at 1319* ("It is recognized in most jurisdictions that airlines owe a heightened duty of care to their passengers."); *Williams v. Trans World Airlines, 509 F.2d 942, 946 n. 8 (2d Cir.1975)* ("It has generally been held . . . that commercial air lines . . . owe their passengers the duty of utmost care for their safety.").

In this case, as a result of his position as an airline passenger, Dr. Hanson's ability to make decisions about his fate and to act on those decisions was diminished. By entering the controlled environment of the airplane, Dr. Hanson had authorized the flight crew to act on his behalf to protect his safety. In return, he implicitly agreed to obey the commands of the flight crew—to remain in his assigned seat until permitted to move, to sit when told to do so, and not to disrupt the cabin envi-

ronment. Therefore, while Dr. Hanson himself may have been in the best position to recognize the danger that row 48 presented to him, he was in the worst position to actually do something about it.

For these reasons, the Court cannot find that Dr. Hanson's negligence played a more significant causal role in his death than did Ms. Leptourgou's wrongdoing. By the same token, because of Dr. Hanson's unique knowledge of the danger, the Court cannot conclude that he played no role in causing his death. In the end, the Court concludes that the failures of both parties contributed equally to the tragedy that followed. Therefore, the Court finds that Dr. Hanson was comparatively liable for his death at a rate of 50%.

V. Damages

Having determined that defendant is liable under the Warsaw Convention, that defendant's liability is not limited to $75,000, and that defendant was contributorily negligent in causing his own death, the Court must next determine the total amount of damages suffered by plaintiffs as a result of Olympic's misconduct. The evidence before the Court supports an award of damages commensurate with the pecuniary loss to Dr. Hanson's surviving family. The parties have not established in their briefs or their arguments to the Court that damages in excess of that amount are legally appropriate in this case.

To determine the amount of pecuniary damages, the Court received a report and heard testimony from C. Daniel Vencill, Ph.D., who examined Dr. Hanson's financial health for the purposes of determining damages in this case. Dr. Vencill's testimony was uncontradicted, and his conclusions went largely unchallenged by defendant. Defendant's post-trial brief and argument do not

attack the validity of Dr. Vencill's methodology or his calculations.

Dr. Hanson's earning history shows an average taxable income of $140,052.12 over the six-year period prior to his death. He intended to work until at least age 65 in order to provide for his family and finance his children's college education. Based on Dr. Vencill's uncontroverted testimony, assuming a 5.5% discount rate and a 2% growth rate, and deducting at a rate of 31% for personal consumption, the Court concludes that the total amount of pecuniary loss to plaintiffs as a result of Dr. Hanson's death was $1,400,000.00.[12]

This finding is supported by Dr. Vencill's calculations, as presented in his written and oral testimony to the Court. In reaching this conclusion, the Court is guided by Dr. Vencill's testimony that the most accurate calculation of Dr. Hanson's income is reached by modifying Dr. Hanson's taxable income to account for cash flow. Additionally, the Court finds Dr. Vencill's calculations based on Dr. Hanson's six-year earnings more reliable than the calculations based on Dr. Hanson's 1997 earnings alone. Finally, although Dr. Vencill posited at trial that a higher figure of approximately $1.5 to $1.6 million was appropriate, the Court accepts the $1.4 million figure because it more accurately reflects the total amount of non-market work performed by Dr. Hanson in his home prior to his death.

As noted above, the Court finds that Dr. Hanson was comparatively negligent at a rate of 50% in causing his death. Therefore, plaintiffs may recover only 50% of

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12 Although Dr. Hanson's medical practice sold for $200,000 after his death, the Court will not use this figure to mitigate the total damage to the surviving family members. The practice would have elicited a similar price upon Dr. Hanson's retirement even if he had not died in 1998.

their $1,400,000.00 in economic losses. The Court awards plaintiffs $700,000.00 in total damages.

CONCLUSION

For the foregoing reasons, the Court hereby finds that an accident occurred aboard Olympic Airways Flight 417 on January 4, 1998, and that the accident caused the death of Dr. Abid Hanson. The Court further finds that Olympic Airways committed willful misconduct in failing to react to Ms. Rubina Husain's requests for a seat transfer for her husband. Finally, the Court finds that Dr. Hanson himself was contributorily negligent in causing his death, and that his negligence contributed to his death at a rate of 50%. Accordingly, the Court hereby awards plaintiffs $700,000.00 in damages.

IT IS SO ORDERED.

RELEVENT ARTICLES OF THE WARSAW CONVENTION

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty,

mandate, or authority of the same High Contracting Party.

49 Stat. 3014-3015.

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject

to proof to the contrary, to have been the result of an event which took place during the transportation by air.

49 Stat. 3019.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 Stat. 3019.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

49 Stat. 3019.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance

with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020.